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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-1528

MIDWEST HANGER COMPANY AND LIBERTY ENGINEERING CORPORATION, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner, Midwest Hanger Company and Liberty Engineering Corporation, respectfully prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 20, 1973, and March 21, 1973, respectively.

OPINIONS BELOW

The decision of the Court of Appeals from which this petition is filed is not yet officially reported. It is reproduced herein as Appendix "A" commencing at page 1a. A Petition for Rehearing En Banc of this de-

cision was denied on March 15, 1973 (Appendix "E p. 15a), and Judgment for Respondent, printed pages 16a-20a, Appendix "C", was entered on Mar 21, 1973. Petitioner's motion to stay the court's ma date pending the outcome of this petition was grant on April 12, 1973, and a copy of the court's Order printed herein as Appendix "D", p. 21a. The Cou of Appeals' decision affirmed in part and denied in pa enforcement of an order of the National Labor Rel tions Board, 193 NLRB No. 85 (1971), reprinted her in as Appendix "E", pages 22a-23a. That decision, turn, affirmed a decision rendered by Trial Examin Ivar Peterson which is reprinted herein as Append "F", pages 24a-72a.

JURISDICTION

The judgment of the Court of Appeals for the Eigh Circuit, following a denial of a Petition for Rehearin En Banc on March 15, 1973, was entered on March 2 1973, and this Petition for Certiorari was filed with 90 days of the court's judgment. This Court's juri diction is invoked under 28 U.S.C. § 1254(1) and 2 U.S.C. § 160(e).

QUESTIONS PRESENTED

1. Whether, under the principles expressed by thi Court in *S.E.C.* v. *Chenery Corp.*, 332 U.S. 194, an *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, th Court of Appeals may uphold the Board's decision b substituting its own rationale for that relied upon b the Board.

2. Whether the Court of Appeals misapprehended it role as set forth by this Court in *Universal Camer Corporation* v. *NLRB*, 340 U.S. 474.

STATUTES INVOLVED

The statutes involved are 29 U.S.C. § 158(a)(1), (3), and (5) which are set out in full in Appendix "G" to this petition at pages 73a-74a.

STATEMENT OF THE CASE

The issues in this petition arise out of the discharge of eighteen named individuals at the Petitioner's plant between June and August, 1970.

Midwest Hanger Company and Liberty Engineering Corporation (hereinafter "the Company") operate a small business producing laundry and drycleaning packaging products (App. 2a, 25a). Economic circumstances forced the Company to raise the price for these products in May, 1970 effective June, 1970. As a consequence, the Company anticipated—accurately as it turned out—that customers would stock up prior to the price increase, and that orders would be severely reduced for a significant period thereafter. This was, in fact, the case, and Company sales after June plummeted (App. 2a).[1]

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[1] As found by the Board (App. 56a), the undisputed record showed the following sales pattern in 1970:

January	$202,000
February	203,000
March	227,000
April	236,000
May	210,000
June	315,000
July	127,000
August	145,000
September	218,000
October	139,000
November	192,000
December	201,000

To try to head off economic disaster, Company Pre dent Jones, just prior to the price increase taki effect, telephoned his General Manager, Ward, and Plant Manager, Brown, and ordered a reduction in t number of Company employees. Ward and Brown, turn, met over the weekend of June 13 and 14 and c cided to terminate immediately 15 employees and su employees began to be notified of this decision duri that weekend (App. 36a, 39a, 40a, 44a, 45a). Thr other employees, who the Board held were discrim natees, were terminated in subsequent months, alo with many other employees whose terminations we not challenged by the Board in its Complaint again Petitioner (App. 34-35a, 37a). In determining whi employees to sever, Ward and Brown looked to the em ployees' work and attendance records and job pe formance in addition to releasing employees whose jo functions were not economical to maintain (App. 3 28a, 40a, 43a, 44a, 48a).

The Trial Examiner, whose decision was adopted *pr forma* by the Board, viewed the cutbacks recited abov as pretextual and found that the Company's real mot vation was to undercut an organizational drive by th United Steelworkers of America (the "Union"), whic had filed with the Board a petition for representatio of the employees which the Company received o Monday, June 15, 1970. There was no showing of an prior knowledge by the Company of the Union organiz ing campaign before it received a copy of the petitio for representation (App. 2a). To support its view the Board relied heavily on the argument that:

> "... approximately 99 percent of those terminated were members of the Union, whereas the Union signed up only 75 percent of the employees." (App 60a).

In addition, the Board argued that it was inconsistent for the Company to terminate employees and then advertise for and hire new employees in the succeeding months (App. 32a, 60a).

However, Petitioner demonstrated to the court below[2] that the Board's "percentage argument" was based upon the selectivity with which counsel for the General Counsel picked those employees on behalf of whom he charged discrimination; and that in fact many other nonunion employees had been discharged by the Company during the same period and for the same reasons as the Company gave for those the Board held had been discriminatorally discharged.[3] The Court of Appeals recognized the validity of Petitioner's argument, since it acknowledged:

> "The company challenges these statistics by countering that other discharges of non-union adherents during the same period of time as the discharges in question would alter the figures. *This may be correct* but there still exists substantial evidence in the record from which the Board *could* infer that the discharges questioned were discriminatory" (App. 4a). (Emphasis supplied).

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[2] The jurisdiction of the court below was invoked under 29 U.S.C. § 160(e).

[3] Specifically, the Company demonstrated to the court that in addition to the 18 terminations which counsel for the General Counsel decided to litigate, there were in addition 17 terminations for similar stated reasons in the same time period, some of whose names had even appeared in earlier versions of counsel for the General Counsel's complaint against the Company. Thus, when all terminations for similar reasons during the same time period were considered, approximately 54% of those terminated were union adherents whereas the general support for the union in the plant was 75%. The Company was not, therefore, discharging union adherents in greater proportion to their overall strength in the plant as found by the Board.

The court below also found that the Company had demonstrated a proper business purpose for the discharges in holding that "a reduction in work force was clearly in order" (App. 3a).

Despite the above, however, the Court of Appeals nonetheless held that 17 of the Company's 18 discharges chosen by counsel for the General Counsel to be litigated as allegedly discriminatory were, as a matter of law, discriminatory. The touchstone of the court's rationale was the following:

> "These discharges must be considered along with the Company's assertion that its biggest problem was employee turnover and the resulting inexperience of its work force. The Company alleged that the employees selected for termination were so selected because they were the least efficient of the Company's work force. *This explanation implied that the employees met the minimum level of competency* required to perform the work. The Company chose to ignore this ready pool of at least minimally qualified persons when it needed additional employees to replace the normal turnover occurring after the reduction in force. Instead of utilizing previously experienced employees, it recruited new, untrained personnel. This action was inconsistent with both the reasonable needs of the business and, more importantly, with the employer's past practice during slack business periods." (App. 5a) (emphasis supplied).

The Court's contention that the Company should have *rehired* old employees to counter subsequent continuing employee turnover introduced a new element into the proceedings not previously the subject of evidence or cross examination at the hearing and not previously relied upon by the Trial Examiner or the

Board. The Trial Examiner and Board had faulted the Company's reasoning that it *was* necessary to discharge so many employees at once; in fact, the Trial Examiner with apparent Board approval surmised that "a more sensible course" for the Company would have been not to discharge experienced personnel at all (App. 54a). The court below, on the other hand *accepted* the Company's view that its economic situation required a drastic reduction in personnel; but then found a discriminatory motivation in the Company's *subsequent* decision not to rehire these employees.

On this basis, the court ordered the reinstatement of 17 employees, even though one employee in this group was not shown to have been a Union supporter, two employees had severe medical problems, and the others admittedly were frequently absent from their jobs or were unqualified to perform the work. The court also ordered the Company to recognize and bargain with the Union without the necessity of an election on the ground that the Company's allegedly discriminatory conduct had made a free election impossible.

REASON FOR GRANTING THE WRIT

The Decision of the Court of Appeals Is in Conflict With Applicable Decisions of This Court

In *S.E.C.* v. *Chenery Corporation*, 332 U.S. 194, 195 (1947), the Supreme Court cautioned lower courts against providing alternate rationalizations of agency decisions in order to uphold those decisions. In the words of the Court,

> "... a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked

> by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency."

More recently, in *NLRB* v. *Metropolitan Life Insurance Company,* 380 U.S. 438, 444 (1965), the Court again, and this time in the context of the National Labor Relations Board, warned:

> "For reviewing courts to substitute . . . their discretion for that of the Board is incompatible with the orderly function of the process of judicial review."

The court below has failed to heed the admonition of this Court, and has fallen into serious error requiring this Court's correction. Specifically, the Court of Appeals introduced its own explanation to support a discriminatory finding against the Company in place of the discredited "percentage theory" which was basically relied upon by the Board. As noted above, the court's explanation, unlike the Board's, accepted as justified the Company's business decision to immediately discharge the employees ("a reduction in work force was clearly in order"), but found discrimination in the Company's later failure to rehire the terminated employees whom the court viewed as "minimally qualified," and hence superior to new hires.

The court below admits that its rationalization of the Board's ultimate finding of discrimination is pitched on a different basis that that of the Board. Thus, after admitting that the Company's answer to the Board's

percentage theory of liability was correct, the court baldly proclaimed that there was other "substantial evidence in the record from which the Board *could* infer that the discharges questioned were discriminatory" (App. 4a) (emphasis added). The court below thus admits that its substitute theory is one that the Board did not in fact rely on, but only "could" have relied upon. There is, therefore, no issue concerning whether the rationalization put forward for the first time by the Court of Appeals was relied upon in any way by the Board. The court below admits that it was not.

The wisdom and prudence of this Court's *Chenery-Metropolitan* line of cases is revealed by the difficulties of a rationalization for agency action supplied for the first time by a Court of Appeals.

The court's substitute theory of an "implication" that the terminated employees "met the minimum level of competency" and thus should have been rehired before new employees, has no substantial record support and assumes a fact not in evidence, i.e., that the discharged employees were better performers than new employees. The facts, however, pointed the other way. In deciding *who* to terminate, the Company looked primarily to the employee's absentee record and job performance. Those who were discharged were deficient in one or both categories. *A fortiori,* if the Company were justified in originally terminating them for these deficiencies, it would not wish to rehire these employees later, if it had an opportunity to obtain fresh personnel. This is even clearer because the Company had traditionally suffered from a severe absentee problem and was doing all it could to change that. Nor were the jobs involved so highly skilled that the Company

should have preferred recent dischargees to "green" employees, regardless of the former's absentee records or poor performance; in fact, the record showed that the jobs were low skilled (App. 31a). In any event, since the new theory now advanced by the Court of Appeals was not the theory on which the case was tried and decided by the Board, the parties never litigated the factual issue of whether the new personnel hired by the Company were in fact better performers than the employees terminated.

Furthermore, two of the dischargees had severe medical problems. David Covey had injured his back on the job; and Shirley Lauderdale had a skin infection that caused her hands to break out in a rash (App. 40a, 45a). Yet the clear conclusion from the Court of Appeals' decision is that the Company was bound to rehire these two employees now found by the court by an "implication" to be "minimally competent", regardless of their medical condition, on pain of being held in violation of the law. This unfair result graphically illustrates the reason for this Court's rule in *S.E.C.* v. *Chenery Corporation* and *NLRB* v. *Metropolitan Life Insurance Company* which the court below violated. Petitioner stands convicted, therefore, on an alternate theory not advanced in the trial of the case and not relied upon by the Trial Examiner or the Board. The inherent inequity of such a procedure has been obvious to this Court for at least twenty-six years.

In "substituting what it consider[ed] to be a more adequate or proper basis" for the end result reached by the Board, the Court of Appeals also ran afoul of this Court's decision in *Universal Camera Corporation* v. *NLRB,* 340 U.S. 474 (1951). That decision requires the Court of Appeals to uphold the Board only where

there is substantial evidence on the whole record to support the *Board's* decision. Clearly, the court below was of the view that such evidence did not exist, since it found itself forced to devise an alternate rationale for the Board which the Board "could" have relied upon, but did not. As a consequence, the court was bound by *Universal Camera* to deny the Board's request for enforcement of its order against the Petitioner. As this Court stated:

> ". . . courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. *The Board's findings* are entitled to respect; but they *must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.*" 340 U.S. at 490. (emphasis supplied).

Of course, as explained above, the court below refused to set aside the Board's findings even after the court agreed that the major ground underlying the Board's decision was faulty. As a consequence, the court failed to carry out its responsibilities to properly review the decision of the Board, and such failure requires reversal by this Court.

CONCLUSION

For the above specified reasons, the Petitioner prays that this Court grant a writ of certiorari to review the decision of the Court of Appeals.

Respectfully submitted,

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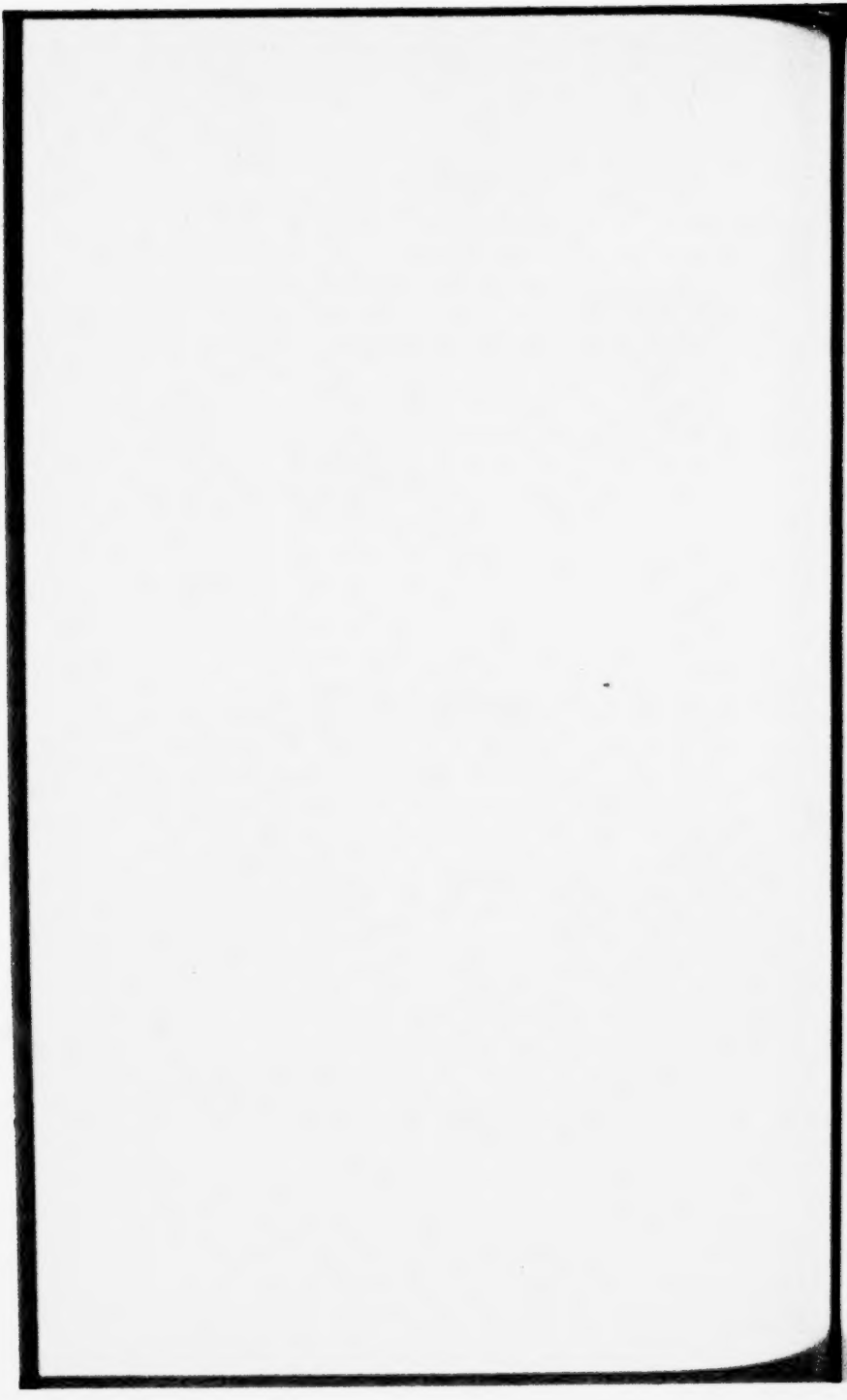

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 72-1115

National Labor Relations Board, Petitioner,

v.

Midwest Hanger Co. and Liberty Engineering Corp., Respondent.

On Application for Enforcement and Cross Petition for Review of an Order of The National Labor Relations Board.

Submitted: November 13, 1972.

Filed: February 20, 1973.

Before GIBSON and LAY, Circuit Judges, and DURFEE,* Court of Claims Judge.

GIBSON, Circuit Judge.

The National Labor Relations Board seeks enforcement of is decision and order reported at 193 N.L.R.B. No. 85. The Board found that Midwest Hanger Company and Liberty Engineering Corporation [1] committed unfair labor

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* United States Court of Claims Judge sitting by designation.

[1] These two companies have a common ownership and management and occupy the same building, employing approximately 90 production and maintenance persons. Reference hereafter will be as to the Company and will include either or both companies as appropriate.

practices in (1) coercive interrogation of one employee, (2) discriminatory discharge of 18 employees during a union organizing campaign, (3) threatening striking employees with discharge or other reprisal and (4) discharge of one employee at the conclusion of an unfair labor practices strike upon his unconditional offer to return to work.

Although an election petition was filed, no election has yet been held. The Board ordered reinstatement with back pay for all concerned employees and further entered a bargaining order based upon its finding that the employer's actions precluded the holding of a valid election.

The Factual Background: The United Steelworkers of America, AFL-CIO, began its campaign to obtain recognition as the bargaining representative for the employees of the Company on June 1, 1970, when four employees signed authorization cards. The campaign reached its peak on June 11 and 12, when the Union mailed a letter to the president of the Company requesting recognition and offering to prove its majority status by submitting the signed authorization cards to a neutral party for inspection and verification. The Company received the letter on Monday, June 15; it made no reply.

During the intervening weekend the Company, which manufactures laundry and dry cleaning products, had selected 22 employees for discharge. These terminations were attributed to an expected decline in business due to a previously announced price increase effective as of June 15. Jones, the President of the Company, testified that their customers built up large inventories between the announcement and the effective date of the price increase. This had two effects; first, it caused an increase in work load over normal levels during the period just prior to the date of increase as customers built up their stock at the lower price, and second, it caused a decrease in business after the date of the increase as these customers reduced

their inventories to normal levels. The standard which the Company claimed to have used in selecting the employees to be terminated was the efficiency of the employee based on skills, attendance habits and ability. The Company contends that the employees discharged were the least efficient of its employees.

The Discriminatory Discharge: The General Counsel charges that the Company violated Section 8(a)(1) and (3) by the discharge of 18 named employees during the weekend of June 13 and 14 and thereafter. Seven of the employees were discharged during the weekend, six on Monday, June 15, and two on Tuesday, June 16. Two of the other three were discharged on July 1 and the other on August 11.

The discharge of a large number of employees including some union leaders during a union organizing campaign would appear to be "inherently destructive of employee interests," thus placing the burden on the Company of explaining away or justifying its action. As said in *NLRB* v. *Great Dane Trailers,* 388 U.S. 26, 34 (1967):

> "From this review of our recent decisions, several principles of controlling importance here can be distilled. First, if it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations."

Though a reduction in work force was clearly in order, the manner in which the Company made the reduction gave rise to a finding by the Board that the stated reasons given were pretextual.

Even though the employer may reduce its number of employees, it may not discriminate because of union ac-

tivity in the selection of those to be terminated. The General Counsel relied initially on a percentage test to show that the selection procedures had been used to discriminate against the union employees. Of the 18 discharged employees, all but one had signed authorization cards. This presented a telling percentage of 95 per cent discharge of union adherents while the percentage of union employees in the plant as a whole was 70 per cent. This on its face would indicate a discriminatory discharge violative of the Act. *Hamilton-Brown Shoe Co.* v. *NLRB*, 104 F.2d 49, 53 (8th Cir. 1939); see, *Annot.* 153 A.L.R. 841 (1944). The Company challenges these statistics by countering that other discharges of non-union adherents during the same period of time as the discharges in question would alter the figures. This may be correct, but there still exists substantial evidence in the record from which the Board could infer that the discharges questioned were discriminatory, and the Board can properly consider in context the discharges made during a crucial period of the organizing campaign.

As stated by Judge Lay in *NLRB* v. *The Freeman Company,* (8th Cir., No. 72-1149, Dec. 27, 1972):

> "The rule is generally recognized that where the company demonstrates a proper business reason which standing alone would justify the company's action affecting employees, the Board has the burden to overcome this fact and demonstrate that the reasons exercised by the company were pretextual. *Reliance Insurance Companies* v. *N.L.R.B.*, 415 F.2d 1, 7 (8 Cir. 1969); *N.L.R.B.* v. *Gotham Industries, Inc.*, 406 F.2d 1306, 1309 (1 Cir. 1969)."

We feel the Board here has carried, with exceptions later discussed, its burden of proof. Although evidence of a proper business purpose was supplied by the Company, the record contains substantial evidence to overcome the prima facie business purpose and to warrant an inference

of discrimination. The most persuasive of this evidence is the showing by General Counsel that while these employees [2] were discharged rather than laid off, the Company continued to advertise in a local newspaper for new employees, and that within a month after the discharge of these employees the Company began to hire new employees to maintain the work force at the new reduced level.[3]

These discharges must be considered along with the Company's assertion that its biggest problem was employee turnover and the resulting inexperience of its work force. The Company alleged that the employees selected for termination were so selected because they were the least efficient of the Company's work force. This explanation implied that the employees met the minimum level of competency required to perform the work. The Company chose to ignore this ready pool of at least minimally qualified persons when it needed additional employees to replace the normal turnover occurring after the reduction in force. Instead of utilizing previously experienced employees, it recruited new, untrained personnel. This action was inconsistent with both the reasonable needs of the business and, more importantly, with the employer's past practice during slack business periods.

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[2] These employees were Ronald Greathouse, David, Covey, Virgie Peterson, Margaret Buckley, Sharon Meier, James Walter Forbis, John Ashby, Marilyn Kimberlin, Shirley Lauderdale, William Greathouse, June Elliott, Joseph DeMent, Michael Owens, Charles Lankford and John Sells. These employees were all discharged over the weekend of June 13-14 or the two days following. Three other employees were found to have been discharged for union activities, however their discharges were removed in time from the discharges due to the decline in business and the employer did not allege that these employees were discharged for that reason. These three discharges will be discussed separately.

[3] The Company hired seven employees in the latter half of June, ten in July and 22 in August.

While we recognize that the National Labor Relations Act does not give the Board license to dictate the method by which an employer must reduce his work force, the Board may consider the method selected just as it does any employer action affecting employees where it finds that the action was taken for a prohibited purpose. The method selected for the reduction in work force may in itself be evidence of a discriminatory purpose when considered in light of the surrounding circumstances. The Act protects employees' rights to organize and bargain collectively and any action taken by management to thwart that right is violative of the Act.

Majestic Molded Products, Inc. v. *NLRB*, 330 F.2d 603 (2d Cir. 1964), presents a factual situation sufficiently analogous to the instant case to lend authoritative support to the Board's position. In *Majestic* two related companies had the same officers and shareholders and shared the same building. Both companies were unionized. During a period when a rival union was trying to gain recognition as the bargaining representative in one of the companies, Lucky Wish Products, Inc., a substantial number of employees were laid off. The company alleged that the layoff was due to a decline in business. At the same time, however, the sister company, Majestic Molded Products, Inc., increased its work force. The Court held that Majestic's failure to hire the employees laid off by Lucky Wish, in the absence of credible evidence other than the bare statements of management that the employees laid off by Lucky Wish were not qualified to perform the work done at Majestic, would support an inference that the layoff had been made because of the union activity and not for the reasons advanced by the employer.

The Company's failure here to preserve this group of experienced employees in combating normal attrition of workers, indicates a desire to permanently dissassociate these employees from the Company, a desire which would

be consistent with an anti-union motivation in the terminations. The Board, at least, could draw this permissible inference of illegal discrimination from the factual situation presented. Also casting doubt on the Company's explanation that the employees selected for termination were the least efficient employees in the plant is the fact that the selections were made without consulting the foremen who as members of management could best evaluate job performance of the employees. Although it was proper for the Company officials to reserve to themselves the decision on the dischargees, their failure to consult with the supervisors who best know the efficiency of each employee indicates that the criteria which was followed in making the selections was focused on some other aspect of the employee's conduct rather than efficiency.[4]

Athough the evidence in this case is conflicting on the charge of discrimination in the discharge of the named employees, there is substantial evidence from which the Board could permissibly infer discriminatory motives in the discharges, and we must enforce the Board's Order proving for reinstatement and back pay for these employees.

Two other employees were discharged on about July 1, allegedly for excessive absences. Elaine Peukert was absent 55.5 hours between January 1 and June 16, and she had received several warnings. She was not absent from June 16 to the time of her discharge. Kim Bristow was absent on June 16 and the next day was given a written warning. On June 29, she requested the next day off to go to the doctor and received permission. On her return to work on the following day, she was informed that she was discharged for repeated absenteeism. She was not

[4] This would not necessarily be true where there was some system of employee evaluation in effect by which the higher management officials would have a valid gauge available to objectively measure the employee's abilities.

absent between June 17 and June 29. During this period both employees had engaged in overt union activities which had come to the attention of management.

The Hearing Examiner found that these two employees had been discharged in violation of the Act and the Board ordered their reinstatement with back pay. Due to the prior discharges which we have found to be an unfair labor practice, the intervening union activity and the length of time between any unexcused absence and the discharge, there is substantial evidence to support the Board's findings and the Order will be enforced as to those two employees.

Betty Johnson was discharged on August 11 for excessive absences. The Gneeral Counsel concedes that she had been "frequently absent prior to June 6." On June 16, she received a written warning concerning absences. She refused to sign the warning. On July 13, after several more absences, she was again given a written warning. After four more absences she was discharged. Conceding that she was active in the union organization drive, it is obvious that the employer had ample cause to discharge her for aggravated and continued absenteeism, and, in the absence of any evidence that this discharge was motivated by any prohibited purpose, we hold that the finding that the discharge was in violation of the Act is not supported by substantial evidence. We, therefore, will not order enforced that portion of the Board's Order which required her reinstatement and back pay.

The Coercive Interrogation: John Sells applied for employment with Liberty Engineering in February 1970. At the employment interview Sells was asked how he felt about unions. He replied that in theory unions were "one of the greatest things that had ever been brought about," but that sometimes they get misused. The interviewer told him that they might have some union trouble. Sells replied that since the plant was located in an area where

most of the companies were non-union he wouldn't have anticipated any trouble at all. Sells was hired about one week after the interview.

On June 15, the General Manager came to Sells at work and asked him if he had heard any union talk around the plant. Sells answered that he had and upon being asked how long he had heard the talk, replied "at least a couple of weeks." The General Manager asked Sells to inform him if he heard anything else. Later that afternoon Sells was discharged.

Under the criteria set out in *NLRB* v. *Ritchie Mfg. Co.*, 354 F.2d 90, 99 (8th Cir. 1906), we find there is substantial evidence in the whole record to support the Board's finding of coercive interrogation. Under *Ritchie* we look not only to the questioning itself but also at the circumstances surrounding the interrogation. *Ritchie* pointed out five circumstances which should receive close attention. These are:

> "[A] history of employer hostility and discrimination, the nature of the information sought (e.g., was the interrogator seeking information from which he could take action against individual employees), the identity of the questioner (i.e., what was his position in the company), the place and method of interrogation, and the truthfulness of the reply (e.g., did the interrogation inspire fear leading to evasive answers)." 354 F.2d at 99.

These standards had been previously enunciated by the Second Circuit in *Bourne* v. *NLRB*, 332 F.2d 47, 48 (2d Cir. 1964).[5]

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5 The Fifth Circuit added a caveat in *NLRB* v. *Cameo, Inc.*, 340 F.2d 803, 804 (5th Cir.), *cert. denied*, 382 U.S. 926 (1965). The Court said, "This list is not intended to be definitive and intimidation may occur even if all these factors cut in favor of the employer. Bog warns [Bok, *The Regulation of Campaign Tactics*

In the instant case certain of the circumstances point to the interrogation as having a coercive effect. The interrogation occurred against the background of a substantial discharge of employees at the time of the interrogation. The questioner, Ward, was the General Manager of the Company. Although the questioning took place at Sells' work area it was under circumstances by which Sells might think that Ward had sought him out for questioning rather than having the questions occur in a casual conversation. Finally, Sells' answers while not untruthful were evasive. Sells was one of the instigators of the union movement and was well aware of the extent of the union campaign at the time of the questioning. He did not, however, volunteer this information or any information to Ward. Management could and probably did view his answers as unsatisfactory to it; hence, his discharge.

These facts constitute substantial evidence to support the Boards' conclusion that the questioning was coercive and therefore constituted an unfair labor practice under 29 U.S.C. § 158(a)(1).

The Letter to the Strikers: It is disputed whether a letter sent by the Company to the striking workers was found to be a violation of the Act. The letter was dated October 30, and informed the employees that the plant would reopen on Monday, November 2, and that employees who did not "wish to report to work as scheduled [would]

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in Representation Elections under the National Labor Relations Act, 78 Harv. L. Rev. 38, 107 (1964)] that 'Employers must beware of interrogation unless (1) they have a valid purpose for obtaining information concerning the union's strength; (2) they communicate this purpose to the employees; and (3) they assure the employees that no reprisals will be taken.'" The Court there points out that even though the factors favor the employer under the *Bourne* test, intimidation may nevertheless occur if the employer does not heed the warning of *Camco*. This seems to be sound advice.

be given until Wednesday, November 4, to seriously consider [their] decision."

In the amended complaint the General Counsel alleged that this letter contained the threat of discharge or other reprisal directed at the striking employees. No other activity of the Company which could be construed as such a threat was litigated. The Hearing Examiner found that "by threatening employees with discharge or other reprisals fro engaging in a strike, the [Company] violated Section 8(a)(1) of the Act." While the decision is not pinpointed with regard to this letter, in the context of the entire record the finding can only be construed to relate to the letter. The letter can certainly be viewed as coercive and as an illegal interference with the employees' right to organize.

That portion of the Order which requires the employer to cease and desist threatening the employees with discharge or other reprisals is ordered enforced.

Termination of Grover Speck: On October 22, 1970, the employees on the second shift picketed the plant demanding the reinstatement of the employees discharged since June 12. They were later joined by employees from the other two shifts. Grover Speck, a long haul truck driver for the Company, was scheduled to haul a load out that evening. He arrived at the plant about 5:00 p.m. but upon the request of the strikers, refused to cross the picket line. When the strike ended and the other employees returned to work Speck was discharged. The Company alleged that the discharge was for cause putting forward four independent grounds as giving cause for discharge. These were: (1) failure of Speck to return a telephone call from the Company president relating to loads delivered before the strike, (2) uncomplimentary remarks made about the Company president during a job interview, (3) misconduct during the strike, and (4) abuse of leased equipment.

The latter two of these reasons, if true, give adequate cause for discharge. The misconduct which was alleged was that during the strike Grover Speck had followed a replacement driver, who was then operating a company truck, in an unsafe manner, at high speeds on a narrow winding road. The employer presented the testimony of the truck driver as to the occurrence of this event and it was corroborated by the Company president who saw Speck's car leave following the truck and another Company employee who testified that he saw Speck's car following the truck. Speck denied that the incident occurred.

The Board has held that "admitted reckless driving in pursuit of an employee in another automobile during the strike was conduct which justified [the employer] in denying his request for reinstatement." *United Brass Works*, 126 N.L.R.B. 537, 545 (1960). This Court has held that if the employer had reasonable cause to believe that the striking employee had been engaging in unprotected strike activities and, in reliance on that belief, refused to reinstate him, no violation of the Act results. *Local No. 3, United Packinghouse Workers of America, CIO* v. *NLRB*, 210 F.2d 325, 331 (8th Cir.), *cert. denied*, 348 U.S. 822 (1954).

The Hearing Examiner found that the record did not support this defense, but no explanation of this finding was made. Although the reckless driving was not admitted by Speck, there was no finding of a lack of credibility of the three Company witnesses who testified concerning the incident. There was no finding supported by substantial evidence, or any evidence at all, that the reason for discharge was pretextual and that the true motive for Speck's discharge was his union activities. The record clearly supports the occurrence of the incident.

Another ground which would justify the Company's refusal to reinstate Speck was the alleged abuse of equipment used by Speck. Midwest Hanger does not own its trucks; they are leased from Schock Leasing, Incorpo-

rated. Under the terms of the lease, Midwest furnished the drivers and Schock performed all maintenance and repairs. In the case of abuse of equipment by the drivers Schock may require the Company to replace a driver. If Midwest does not do so Schock can shift the cost of repairs to Midwest. The president of Schock Leasing testified that the equipment assigned to Speck had been abused, that he had been observed operating it in an improper manner, that his equipment required excessive repairs, and that the engine governor had been tampered with, allowing the engine to overrun, resulting in damage. The president of Schock Leasing contacted President Jones of Midwest Hanger and told him that Speck would have to be replaced. The Hearing Examiner did not credit this testimony because no documentary evidence was produced to support the testimony of the president of Schock Leasing.

There appears to be no reason to discredit the testimony of the president of Schock Leasing for failing to bring in books and records to support his testimony. The "best evidence" rule is not applicable here; he did not testify as to the contents of the records. If there was any doubt in the mind of the General Counsel, the records were equally available to him through the use of the discovery procedures provided. There is no reason to believe that the witness was other than a disinterested third party. It is also relevant to note that the central thrust of the testimony, the fact that Schock Leasing told Midwest Hanger that Speck would have to be replaced, would not be found in the records.

The Board's decision that Grover Speck was discharged because of his union activities is not supported by substantial evidence on the record considered as a whole. While we recognize the strikers are generally entitled to reinstatement upon their unqualified offer to return to work, subject to the availability of a job in the case of an economic striker, such a right is not absolute; there are

certain recognized exceptions to the rule. Both of the reasons which we have discussed fall within such exceptions. After the employer has offered legitimate business reasons which would justify his actions, the Board plainly has the burden of going forward and offering evidence that the reasons advanced were pretextual. *NLRB* v. *The Freeman Co., supra.* The General Counsel's bare contention that this discharge was motivated by Speck's union activity is unsupported by any evidence whatsoever and further is refuted by the record; no other striking employees were discharged and this discharge was isolated by more than four months from the other discharges associated with union activity in the plant. That portion of the Board's order which requires reinstatement and back pay for Grover Speck is denied enforcement.

The Bargaining Order: On the basis of the unfair labor practices which had been found, the Board concluded that since the Union had acquired cards from a majority of the employees and since the employer's conduct had tended both to destroy the majority and to negate the likelihood of a future fair election, a bargaining order would be appropriate. The employer challenges this bargaining order on the sole grounds that it committed no unfair labor practices. We have found substantial evidence to support the findings of unfair labor practices as to all those charges except the discharge of Grover Speck and Betty Johnson. In view of these findings the contention of the employer is without merit and the bargaining order is granted enforcement.

The Board's Order is enforced except for that portion which requires reinstatement and back pay for Grover Speck and Betty Johnson.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1972

No. 72-1115.

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

MIDWEST HANGER CO., AND LIBERTY ENGINEERING CORP., *Respondents*.

On Application for Enforcement of Order of the National Labor Relations Board.

The Court having considered petition for rehearing en banc filed by counsel for respondent and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

March 15, 1973

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Filed Mar. 21, 1973

No. 72-1115

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

MIDWEST HANGER CO. AND LIBERTY ENGINEERING CORP., *Respondent*.

Judgment

Before: Gibson and Lay, Circuit Judges and Durfee* Court of Claims Judge.

THIS CAUSE came on to be heard upon an application of the National Labor Relations Board for enforcement of its order issued on October 8, 1971, against the above-named Respondent, its officers, agents, successors and assigns. The Court heard argument of respective counsel on November 13, 1972, and has considered the briefs and transcript of record filed in this case. On February 20, 1973, the Court being fully advised in the premises handed down its opinion granting in part and denying in part enforcement of the Board's order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Midwest Hanger Co. and Liberty Engineering Corp., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Discouraging union membership or concerted activities of its employees by discriminatorily discharging or refusing to reinstate any employee, or by discriminating in

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* United States Court of Claims Judge sitting by designation.

any other manner in regard to their hire or tenure of employment, or any term or condition of employment.

(b) Refusing to recognize and bargain collectively with United Steelworkers of America, AFL-CIO, as the exclusive representative the employees in the appropriate unit.

(c) Questioning employees concerning their union membership or activities or threatening to discharge employees because of their membership or activities in the Union, or in any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-mentioned Union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer to the following employees who have not heretofore been fully reinstated to their former jobs, or if these jobs no longer exist, to substantially equivalent positions, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them, in the appropriate unit in the section of the Trial Examiner's Decision entitled, "The Remedy."

Margaret Buckley
Sharon Meier
David Covey
John Ashby
Walter Forbis
Ronald Greathouse
Marilyn Kimberlin
Virgie Peterson
June Elliott
Kim Bristow
Elaine Peukert
Joseph DeMent
Charles Lankford
Mike Owens
John Sells
William Greathouse
Shirley Lauderdale

(b) Notify immediately the above-named employees, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

(c) Upon request, bargain collectively with United Steelworkers of America, AFL-CIO, as the exclusive representative of the employees in the appropriate unit concerning wages, hours, and all other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(d) Post at its Liberty, Missouri plant, copies of the Notice attached hereto as "Appendix." Copies of said Notice, on forms provided by the Regional Director for Region 17, (Kansas City, Missouri), shall, after being duly signed by an authorized representative of Respondent, be posted immediately on receipt thereof, and be maintained for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(e) Notify the said Regional Director in writing, within 20 days from the date of this Judgment, what steps the Respondent has taken to comply herewith.

DATED: March 21, 1973

Order entered in accordance with Opinion.

Clerk, U.S. Court of Appeals, 8th Circuit
ROBERT C. TUCKER
by W. F. GRUININGER
Chief Deputy

APPENDIX

Notice to Employees

Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing in Part an Order of the National Labor Relations Board an Agency of the United States Government

The National Labor Relations Board having found, after a trial, that we violated Federal Law by questioning employees regarding their union activity, threatening to discharge employees to avoid dealing with a union, by later discharging employees because of their union activity and refusing to reinstatement them, and refusing to bargain with the Union:

We Will Offer full reinstatement to the employees listed below, if not heretofore fully reinstated, and pay them for the earnings they lost as a result of the discrimination against them, plus 6 percent interest.

Margaret Buckley
Sharon Meier
David Covey
John Ashby
Walter Forbis
Ronald Greathouse
Marilyn Kimberlin
Virgie Peterson
June Elliott
Kim Bristow
Elaine Peukert
Joseph DeMent
Charles Lankford
Mike Owens
John Sells
William Greathouse
Shirley Lauderdale

We Will Not discharge or discriminate against any employee for supporting United Steelworkers of America, AFL-CIO, or any other union.

We Will Not question any employee regarding his union activity, threaten to discharge or refuse to reinstate employees in order to avoid dealing with the Union.

WE WILL NOT unlawfully interfere with our employees' union activities.

WE WILL bargain collectively with the Union as the exclusive collective bargaining representative for the employees in the appropriate unit and if an understanding is reached we will sign a contract with the Union.

The bargaining unit is:

All production and maintenance employees, including truckdrivers, at our Liberty, Missouri, plant, but excluding office clerical employees, guards, and supervisors as defined in the Act.

All our employees are free to become or remain, or refrain from becoming or remaining, members of any labor organization, except to the extent that such right may be affected by an agreement conforming to the provisions of Section 8(a)(3) of the Act.

MIDWEST HANGER CO. AND LIBERTY ENGINEERING CORP.

Dated ..... By .....
(Representative) (title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, 610 Federal Building, 601 E 12th Street, Kansas City, Missouri 65106 (Tel. No. (816) 374-5181).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1972

72-1115

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

v.

MIDWEST HANGER, AND LIBERTY ENGINEERING CORP., *Respondents*.

Application for Enforcement of Order of National Labor Relations Board.

On consideration of motion of petitioner in this cause for a stay of mandate of this court pending filing of certiorari proceedings in the Supreme Court of the United States, it is now here ordered that the issuance of the mandate of this court or certified copies of the judgment be and is hereby stayed for a period of thirty days from and after this date, and if within said stay, there is filed with the Clerk of the Supreme Court of the United States a certificate evidencing the filing of petition for writ of certiorari in that court, the stay hereby granted will continue until final disposition of the case by the Supreme Court.

April 12, 1973

APPENDIX E

D—5515
Kansas City, Mo.

193 NLRB No. 85

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 71—CA—4331

MIDWEST HANGER CO. AND LIBERTY ENGINEERING CORP.

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO

Decision and Order

On May 21, 1971, Trial Examiner Ivar H. Peterson issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recomending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions and the General Counsel filed cross-exception to the Trial Examiner's Decision, each with supporting briefs. The Respondent also filed a reply brief to the General Counsel's cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, cross-exceptions, and briefs, and the

entire record in the case, and hereby adopts the findings,[1] conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that the Respondent, Midwest Hanger Co. and Liberty Engineering Corp., Liberty, Missouri, its officers, agents, sucessors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order.

Dated, Washington, D.C.

JOHN H. FANNING, Member
HOWARD JENKINS, JR., Member
RALPH E. KENNEDY, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

[1] An apparent typographical error appears in the Trial Examiner's Decision where he finds that Respondent's crew coverage sheets for the week of June 7 showed an employee complement of 83, rather than 93, employees. A reading of the following paragraph indicates the Trial Examiner, in his analysis of the figures, relied on the accurate figure of 93 rather than the inaccurate one of 83.

APPENDIX F

TXD-229-71
Kansas City, Mo.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D.C.

Case No. 17-CA-4331

MIDWEST HANGER CO. AND LIBERTY ENGINEERING CORP.
and
UNITED STEELWORKERS OF AMERICA, AFL-CIO

Gerald A. Wacknov, Esq., and
Ward Summerville, Esq., of
Kansas City, Mo., for the
General Counsel.

Stanford C. Madden, Esq., of
Kansas City, Mo., for the
Respondent.

Harry E. Andrew, Esq., of
Kansas City, Kan., for
the Charging Party.

Trial Examiner's Decision

Statement of the Case

IVAR H. PETERSON, Trial Examiner: I heard this case on 6 days commencing January 12 and ending January 21, 1971, in Kansas City, Missouri, upon a charge filed on June 16, 1970, amended on July 7, by United Steelworkers of America, AFL-CIO, herein called the Union, which resulted in the Regional Director for Region 17 issuing a complaint dated September 30, 1970, against the Respondent. Briefly stated the complaint as amended at the hearing, alleged that the Respondent interfered with, restrained and coerced its employees in the exercise of the rights

guaranteed them in Section 7 of the Act by unlawfully threatening, interrogating and offering benefits to the employees; that it unlawfully discharged 18 employees and failed to reinstate another striking employee upon the termination of a lawful strike conducted against the Respondent; and that it failed and refused to bargain collectively with the Union which had been chosen as the exclusive bargaining representative by a majority of the employees. In its answer the Respondent denied the commission of any unfair labor practices. On or about March 15, 1971, counsel for the Respondent and counsel for the General Counsel filed helpful briefs with the Trial Examiner, which have been carefully considered.

Upon the entire record[1] in the case and from my observation of the demeanor of the witnesses as they testified, I make the following:

Findings of Fact

I. The Business of the Respondent

The two companies here involved, Midwest and Liberty, are operated as a single economic entity. Midwest manufactures and distributes laundry and dry cleaning packaging products whereas Liberty produces certain machinery used in Midwest's manufacturing operations and also sells such machinery to other users. Liberty serves as the maintenance department of the joint enterprise and is commonly referred to as the machine shop. The Respondent maintains its principal office and plant in Liberty, Missouri. The Respondent admits and the record establishes that it is engaged in commerce within the meaning of the

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[1] Pursuant to leave granted at the hearing, counsel for the General Counsel submitted six crew coverage sheets, for the weeks of June 14, 21, 28, July 5, 12 and 26. These are received in evidence as General Counsel's Exhibits 45, 46, 47, 48, 49 and 50, respectively. Also submitted and received as General Counsel's Exhibit 51 is the employment application of Shirley Lauderdale.

Act and that its annual operations meet the Board's discretionary jurisdictional standards. I so find.

II. The Labor Organization Involved

United Steelworkers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Background*

Carl Jones is president of both companies and the major stockholder in each. Reginald Ward is vice president and general manager, having assumed those positions approximately 2 years prior to the hearing. He is also a shareholder and member of the Board of Directors. The plant manager is Eugene Brown, who has held that position for a little less than 2 years. Mike Ashenfelter is the personnel manager and controller. The number of foremen has varied from 14 to as low as 4 because of the fluctuation in the complement of rank-and-file employees. In June 1970, prior to the termination of some 20 employees, Midwest had slightly more than 80 employees and Liberty had 12 or 13.

On May 10 the Respondent announced a price increase on its products effective the following month. In consequence, the Respondent during May and June experienced substantially increased business as jobbers were stocking their warehouses in order to avoid, insofar as possible, the impact of the price increase. Because of this fact, as well as the customary summer slump in orders, Jones anticipated that the Respondent's production would decline sharply after June 15. On June 12 Jones was in Oklahoma City surveying the market. He testified that from his observation he anticipated that the decline in orders would be considerable immediately after the price increase went into effect. Accordingly, so he testified, on Friday, June 12,

he telephoned General Manager Ward and emphasized to him that the anticipated layoff of personnel should be implemented the following Monday because the "situation was worse than I thought it was so far as orders were concerned."

During the latter part of May Harry Andrew, business representative of the Union, began organizing the Respondent's employees. He first spoke to three employees, June Elliott, Betty Johnson and Marilyn Kimberlin, at the Respondent's parking lot. Thereafter, on June 1, he and another Union representative, Fred George, met with these three employees and another, John Sells, and discussed with them an organizational plan. The four employees signed union membership cards at this time. On Thursday, June 11, another meeting was held at 2:30 p.m., at a shelter house in a public park about a mile and a half or 2 miles from the plant. Employees were informed of this meeting by Kimberlin. Six additional employees signed membership cards at this meeting. They were told by Andrew that if he obtained a strong card majority by the following day he would petition the Board for an election and would also request recognition from the Respondent. Later that same day Andrew met with an additional 13 employees who signed membership cards. They also were advised by Andrew to the same effect as the employees attending the earlier meeting that day.

On Friday, June 12, Andrew sent the Respondent a certified letter requesting recognition and also filed a representation petition with the Board. The letter was received by the Respondent on Monday, June 15. Jones testified, somewhat ambiguously, that he saw the envelope with the Steelworkers name and return address and the certified mail sticker "a little after noon" on Monday and then stated that he saw the envelope "approximately Monday evening" and that he got his mail "sometime in the afternoon. I have no idea when." Admittedly, the Respondent did not reply to the Union's recognition request.

During the weekend preceding Monday, June 15, Ward and Brown conferred and selected the employees who were to be terminated, advising them of their termination by telephone or in person. They attributed the reduction-in-force to a cutback in production. Interestingly enough, however, a frequent reason assigned in the personnel sheets for termination was "excessive absenteeism." Nor did the Respondent follow a system of seniority in selecting employees to be terminated, as was its customary policy. To the contrary, the Respondent selected many individuals who were experienced and capable of performing a variety of jobs. Also, the cuts were substantially confined to the second shift, where union activity was concentrated. The Respondent continued the third shift, whose employees were paid a 5 to 10-cent differential.

On October 22 the employees on the second shift walked out and were later joined by the employees on the other two shifts. They picketed the plant. On October 30 the Respondent sent a letter to its employees stating, in part, that the Respondent "hoped that you will return to your job Monday morning as we will be officially reopening our plant," and added that employees who "do not wish to report to work as scheduled will be given until Wednesday, November 4, to seriously consider" their decision. The Union terminated the strike on November 3, and so notified the Respondent. During the preceding weekend the Union and the Company met and considered which employees wished to or should be reinstated. However, no resolution was reached as the striking employees demanded backpay.

Against this background, counsel for the General Counsel contends that the June terminations were prompted by the union activity of the individuals involved and that one employee, Grover Speck, was discriminatorily refused reinstatement after the strike was terminated. On the other hand, the Respondent urges that the June terminations

were occasioned by an economic cutback in production, and further contends that Speck was refused reinstatement because he engaged in misconduct during the strike. We turn then to a consideration of the specific evidence bearing upon these contentions.

B. *Interference, Restraint and Coercion*

Employee John Sells related that during the first part of February, when he had been hired by Liberty, General Manager Ward asked him: "How do you feel about the Union?" Sells related that he told Ward:

> That without a doubt in concept the labor union for the working man is about one of the greatest things that has ever been brought about. However, I had had some experience in dealing with labor unions that I could see conceivably where they had not necessarily been a benefit, sometimes they get misused.

To this, according to Sells, Ward replied, "You know, we are nonunion here" and added that "We may have some union trouble here." Ward testified that Sells brought up the subject of unions and engaged in a "little tirade about the corruption in unions," to which Ward responded by expressing "a few opinions" on the subject and stated that he was not "really interested in whether you (Sells) are union or not, because if I was I wouldn't be contemplating hiring you knowing you are in a union at Ford (Sells' then employer)."

Richard Covey, who was a foreman until about June 14 when he became a rank-and-file employee at his own request, was asked by Plant Manager Brown if he "had heard anything about any union or anything like that" because Brown stated that "he thought there was something on second shift creating the turmoil or something like that." In addition, sometime before the June terminations, Foreman Billy MacElwee asked Covey if the latter had

heard anything about the Union. In answer, Covey asked MacElwee if the latter had heard anything about the Union and MacElwee laughed and would say nothing more about the matter. On Sunday, June 14, Foreman MacElwee went to the home of employee Joe DeMent and told DeMent and another employee who was there, Walter Forbis, that there was a "work shortage" and the men were being laid off. DeMent undertook to question MacElwee about this matter and MacElwee responded by stating: "All I know is they had a big meeting last night and Mr. Brown called me and told me to come to your house and tell you you were laid off." DeMent rejoined by observing, "It's over that union activity, because the Union petitioned the Company just the day before. . . ." MacElwee replied, "Well, it might be, but I can't talk to you about it . . . I would be placing my own self in jeopardy." Following DeMent's discharge but prior to the time MacElwee quit the Respondent's employ, DeMent attempted to engage McElwee in conversation about his discharge, but MacElwee stated, "Joe, I can't talk to you about this . . . I can't talk to you about it." MacElwee was not produced as a witness and there was no explanation offered for the Respondent's failure to do so. About a week after MacElwee quit he and DeMent had another conversation. DeMent related that MacElwee told him "that we were laid off for union activity," and that the Respondent was attempting to "get the key ones out because the Company didn't want a union in there."

On June 15, shortly before Sells was discharged, Ward came to him and stated, "I hear there is some union talk going on around the plant," and asked Sells if he had heard anything to that effect. Sells stated that he had and Ward then asked how long he had heard such talk. Sells replied that he had heard it for at least 2 weeks, whereupon Ward replied, "Well, if you hear anything else, let me know." Ward was not questioned about this incident.

C. *The Alleged Discriminatory Discharges*

Most of the Respondent's employees are unskilled, primarily females, and over the years there has been a very substantial turnover on an annual basis which is substantially greater in the months of May, June and July. Indeed, counsel for the Respondent states in his brief that the plant "had had a tremendous turnover problem amounting to over two hundred percent (200%) in 1970. ..." The personnel data shows that from January through June the Respondent had the following experience relative to employee turnover:

Month	Employees hired	Employees terminated	Terminations for absenteeism
January	16	24	7
February	8	25	10
March	20	14	5
April	26	23	8
May	41	32	11
June	18	36	16

As the foregoing figures indicate, terminations for absenteeism ranged from a low of approximately 29 percent in January to a high of over 44 percent in June. As counsel for the General Counsel points out in his brief, an analysis of the employment figures shows that of the 26 employees hired in April, only 5 remained on the June 15 payroll; of the 41 hired in May, 11 remained on the June 15 payroll; and of the 13 employees hired on or prior to June 15, 7 remained on the June 15 payroll.

The absentee record and union status of the 25 employees hired in or subsequent to April, and on the payroll for the week ending June 20, is shown in Appendix A. By way of comparison, Appendix B shows the comparable figures for the employees involved in this complaint as alleged discriminatees.

General Manager Ward, called as an adverse witness by counsel for the General Counsel, testified that the termina-

tion of the various employees herein involved "was just a run of the mill of people being terminated, nothing different than any other month of the year." In his rather extensive testimony, both on direct and cross, he made no mention of a call being received by him on Friday, June 12, from Jones, directing him to make the layoffs by the following Monday. By contrast, Jones testified that the employees were terminated only for economic reasons, because he "didn't anticipate business picking up for quite some time." In fact, most of the discharged employees were told they were being terminated for excessive absenteeism and many of them were asked to sign a statement to that effect. The Respondent's records show that about half of the employees terminated were released because of "repeated absenteeism" while the balance were shown as having been terminated because of a "reduction in work force." The Respondent's records further show that some 64 employees were hired following June and that 10 of these were hired in July and 22 in August. Moreover, an analysis of the personnel records of employees terminated for excessive absenteeism prior to and following the discharges involved in the instant case shows a considerable dissimilarity in the actual situations involved.[2]

1. Terminations at Midwest

(a) *Marilyn Kimberlin.* Kimberlin was first employed by the Respondent on January 2, 1969, and was terminated on June 15, 1970. Compared with the vast majority of other employees, Kimberlin had long tenure. She worked on the first shift, from 7:30 a.m. to 4 p.m., in the paper department, being supervised by Foreman MacElwee. She had worked in a number of departments and in consequence was a more valuable employee than many of the newer employees who were not as versatile. As recited above, she was one of the four employees who initiated the

[2] See the detailed analysis of 14 individuals made by counsel for the General Counsel beginning at page 9 of his brief.

union organizational campaign during the latter part of May and attended a union meeting on June 1. She had never been given any warnings, written or verbal, regarding her absentee record. At approximately 9 p.m., Sunday, June 14, Kimberlin received a telephone call from Plant Manager Brown, advising her that some changes had been made over the weekend and that Kimberlin was to work on the second shift (4 p.m. to midnight) in the hanger department beginning the following day. Although Kimberlin had previously told Brown she could not work on the second shift because of personal reasons, she nonetheless agreed to take the assignment.

At about 3 p.m., Monday afternoon, June 15, Brown again called Kimberlin and told her to come to the office before she reported for work at 4 p.m. Kimberlin inquired what Brown wished to discuss and Brown informed her that he had been going over her work record and she was being terminated for absenteeism. She reported to the office and was asked to sign a document (apparently an acknowledgement of the reason for her termination) but she refused to do so. She requested a service letter from the Respondent and on July 15 she received such a letter stating, in part, that her "services on the job were satisfactory" but that it "was necessary to terminate you because of excessive absenteeism," and that the records showed that she had been absent 53 hours in the 5 months preceding June 15 and had been warned by her foreman and the plant manager on more than one occasion. The record is clear, however, that Kimberlin had not been warned by anyone with respect to her absenteeism. Kimberlin solicited signatures on union membership cards from four employees, two of whom were handed to her at the Respondent's parking lot on June 11 or 12. Also, Kimberlin obtained the signature of employee David Schwartz who testified that this occurred after work and that Kimberlin "was catching everybody as they came out of work."

(b) *June Elliott*. Elliott first worked for the Respondent from May 6, 1968, until the latter part of May 1969. She returned to the Respondent's employment November 3, 1969, and was terminated on June 16, 1970. At that time she was working in the hanger department as a spreader. As pointed out above, she was one of the four individuals who initiated the union campaign, and obtained signatures on membership cards from five employees while on the Respondent's premises.

On the first shift on Tuesday, June 16, she noticed that her timecard was not in the rack. Apparently, Elliott had worked the previous day. She asked her foreman, MacElwee, if he had her card. He replied: "No, June . . . I'm sorry, there have been changes made over the weekend and due to a cutback I'm going to have to let you go." Elliott protested, asking him how he intended to operate the plant with all the work that remained and considering the number of people who had already been terminated. MacElwee replied, "I am sorry, June, that is my orders." Elliott was asked to sign a paper stating that she was being discharged because of excessive absenteeism. She had not been given any warnings or reprimands concerning absenteeism. She asked for and received a service letter from the Respondent, dated July 15. In part, it stated that her "services on the job were satisfactory" but that she was terminated for "excessive absenteeism," and that the record showed that she had been absent 53 hours in 1970 and had been warned by her foreman with respect to absences. Elliott, however, testified without contradiction that she had not been given any warnings or reprimands with respect to absenteeism.

(c) *Kim Bristow*. Bristow was hired by Foreman MacElwee in April 1970 and assigned to work in the hanger department as a spreader. On June 16, Bristow had been absent and the following day MacElwee had her sign a warning slip. However, he told her not to be concerned

about that, as it was company policy that employees had to have three warning slips before being terminated. Although Bristow had been absent in times past, she had never been asked to sign a warning slip. The statement she signed read: "This is a warning of your previous absenteeism and unreported absence for 6-16-70." The record shows the following with respect to Bristow's absences following her employment:

April 29	—Missed 1-hour	—Babysitter was late.
May 6	—missed ¾ hours	—Babysitter was late.
May 7	—missed 8 hours	—Said she was sick.
May 8	—missed 1½ hours	—Having trouble getting babysitter.
May 12	—missed 8 hours	—Had to go to doctor.
May 20	—missed ¼ hours	—Cab was late.
May 23	—missed 2 hours	—Didn't have a babysitter after 2 p.m.
June 10	—missed 8 hours	—Sick, went to doctor.
June 11	—missed 8 hours	—Sick.
June 13	—missed 5¼ hours	—Got sick.
June 16	—missed 8 hours	—Did not call in.

Between June 17 and June 29 Bristow did not have any absences. On June 29, she asked Foreman MacElwee if she could take the following day off to see her doctor about a kidney infection. Permission was granted. The following working day, July 1, when Bristow came to work she discovered that her timecard was not in the rack. She attempted to show Foreman MacElwee her doctor's slip, but he told her that Brown had instructed that her termination papers were to be filled out. MacElwee stated that it was not his idea to terminate her but that he had no choice in the matter.

The preceding week, Bristow assisted Bill Greathouse and Marilyn Kimberlin (both of whom had previously been discharged) in carrying a large banner outside the Respondent's premises, in the parking lot, which had the following legend on it: "United We Stand And Divided We

Fall." Both Plant Manager Brown and Foreman MacElwee were standing in the doorway of the plant some 20 to 25 feet away, watching Bristow and the others carry the banner.

(d) *Sharon Meier.* Meier was hired on November 5, 1969, and terminated June 14. She worked in the caping department on the second shift. On Sunday, June 14, Plant Manager Brown telephoned her and told her that "they were going to shut down the caping room, and he didn't have any other place to put me, and that I missed Saturdays." When hired, Meier had told Brown that she had trouble getting babysitters on Saturday. Meier did miss work some Saturdays during her last 2 months of employment, but received no verbal or written reprimands about this. She signed a union membership card on June 11. The crew coverage sheets show that Saturday work was discontinued after the week of June 14, and the Respondent's records further show that Meier had only 27 hours of absenteeism at the time of her discharge and was never warned about missing Saturdays.

When Brown on June 13 told Richard Covey (who voluntarily relinquished his position as a foreman for a rank-and-file job on June 14) that Sharon Meier was going to be discharged, Covey responded:

> I told him that I knew she hadn't come in on a lot of Saturdays, but that she was a real good worker and we needed good workers. That was the thing, how could we run the plant if we didn't have a lot of good people. We had a lot of people in that caping room that weren't working out and it is hard to train someone for that.

Covey further added that he had three girls in the caping room and they put out three times the production of the third shift caping room employees, and it did not seem to him to make sense "to cutback on the second shift when

you have twice as many people on the third not getting any production." According to Covey, Brown replied that he realized this was the situation.[3]

(e) *Virgie Peterson.* Peterson, who did not testify at the hearing, was hired on March 20. Her personnel file shows that she missed work fairly frequently (a total of 103 hours) from the time she was hired until she was terminated on June 13. She worked with Marilyn Kimberlin in the paper department on the first shift and also had worked in the strut department. The reason given for her termination was "excessive and chronic absenteeism." She missed work 8 hours each day on June 8, 9 and 10, but nevertheless she had received no warnings or reprimands. She signed a union card on June 11.

(f) *Elaine Penkert.* She was employed by the Respondent on November 7, 1969 and terminated July 1, 1970. She was on the third shift under Foreman James Hobbs. Her employment record is as follows:

January 6	—missed 8 hours	—(unreported).
January 25	—missed 8 hours	—Sick.
March 1	—missed 6 hours	—Left plant ill.
March 5	—missed 8 hours	—Called in ill.
March 15	—missed 8 hours	—She called in and said she was not feeling well.
March 18	—"Elaine had walked away from her job at that time without being relieved or asking anyone about it. I warned her at that time not to leave again without authorization. J. Hobbs."	
March 20	—"Tuesday night I talked to Elaine and asked her to improve on her attendance record."	
March 29	—"Elaine has missed work excessively and I have talked with her about this before. She was not at work on 3rd shift (3-29-70) and I received no	

[3] It should be observed that on this occasion Brown did not terminate Shirley Lauderdale, a caping department employee hired June 10, just 5 days before the June 15 discharges.

	call. I am giving her a letter in the form of a warning. J. Hobbs."	
May 30	—missed 8 hours	—Scheduled in on Sat. but did not work.
June 15	—missed 8 hours	—Elaine called in and said she was ill and would try to be in tomorrow night.
June 16	—missed 8 hours	—I received no call.

She testified that early in the morning of June 15 at a meeting of third shift employees General Manager Ward stated that despite the "scuttlebut" going around about people being laid off the third shift "didn't have anything to worry about it."

On June 17 Kimberlin gave a union membership card to Neva Paine in the Respondent's parking lot. That night, on the third shift, Mary Wisenbach and Peukert came over to Paine's machine and, according to Paine, the following transpired: Wisenback and Peukert demanded that Paine and another female employee sign a union card right away and that if they did not they would be fired. Paine finally asked Foreman Hobbs if he would tell her that it was up to the individual whether they sign or not. On July 1, Foreman Hobbs told Peukert that he was sorry but he had to let her go although she was a good worker. He indicated that he was required to follow Brown's orders, and told her that she was being terminated for absenteeism. Peukert had not missed any work since June 16, and had not been warned or reprimanded by Hobbs or anyone else regarding her absences of June 15 and 16. In total, Peukert had been absent 55½ hours during her employment. Foreman Hobbs, so Peukert testified, stated he did not want Peukert to be discharged.

(g) *Betty Johnson.* Johnson worked continuously for the Respondent from the middle of July 1968 until August 11, 1970. She had been absent fairly frequently (a total of 80.9 hours). It will be recalled that she was instru-

mental in launching the Union's organizational campaign and succeeded in obtaining several signed union cards. De spite her prior absences, she was first given a written warning on June 16, which stated "This is a warning of your previous absenteeism." Johnson refused to sign the warning slip. She had not been absent since June 6, nor had she been warned verbally about absenteeism in May.

On July 13, Johnson received the following warning from Foreman MacElwee:

> Subject employee is being formally warned (after one other formal warning) that if excessive absenteeism continues she will be terminated. Also she is to bring doctor's slip if she calls in sick.

On August 11, she was terminated, the reason reading as follows (R. Ex. 3):

> Subject employee is being terminated after two formally (sic) warnings and verbal warning of excessive absenteeism and tardiness.

(h) *Margaret Buckley.* Buckley was hired on April 11, 1969, and worked out continuously for the Respondent until May 14, 1970, when she went to the hospital for an operation. On June 12 she telephoned Brown and stated that she was able to report back to work. Brown told her that he was going over the worksheet and would call her back the following day, Saturday. On the evening of June 13 Brown did call and told her that she was going to be terminated because of a "cutback in the caping room." Buckley had worked and was capable of working in other sections of the plant. Her termination report states the following as the reason for her separation: "Reduction in Caping Production—No other jobs available." To the contrary, the record abundantly shows that there were numerous other jobs available and that the Respondent was having difficulty finding employees to fill these jobs.

(i) *Shirley Lauderdale.* Lauderdale was not called as a witness at the hearing. Subsequent thereto (footnote 1 above) counsel for the General Counsel without objection submitted her application for employment as an exhibit, and this shows that Lauderdale began working for the Respondent on June 10. She was employed in the caping department on the second shift until that shift was shut down on June 15. She was then transferred to the hanger department and was not discharged. She complained about an allergy or skin infection which apparently did not develop until after she had been transferred from the caping room. It is the position of counsel for the General Counsel that but for the union activity the second shift caping room operation would not have been shut down and, in consequence, that if it had not been shut down Lauderdale would have continued working in the caping room at work she was capable of performing.

(j) *Ronald Greathouse.* Ronald Greathouse was employed by the Respondent approximately 5 weeks and was terminated on June 12. He worked on the third shift, from 12:30 p.m. to 9 a.m., on the trouser guard machine. On June 12, Foreman Hobbs approached Greathouse while he was at the machine with a paper stating that he was being terminated because he was not suitable for the job and there was no other work available. Foreman Hobbs said that if Greathouse used the Respondent as a job reference no unfavorable statement would be given. While employed by the Respondent Greathouse drove a forklift truck, did packing, worked in the paper department, assisted on the strut machine, and also did janitorial work. Greathouse had never been warned or reprimanded about his work and, at the time Foreman Hobbs terminated him Hobbs stated that he had not made the decision to discharge him but that it came from a higher source. There is credible testimony that during his period of employment Greathouse was only able to work on the trouser guard machine for a limited time because it was inoperative.

Brown testified that the reason for discharging Greathouse was "that his performance on the job, his effort that he was putting into it did not look like he was going to make a good strut operator, or, for that fact, any other job he might be put on." Foreman Hobbs at first testified that he thought he had recommended the discharge of Greathouse because he had been seen in the parking lot during working hours. However, he later testified, and the testimony of Ward and Brown also shows, that the request to terminate Greathouse did not originate with Hobbs but was made by either Ward or Brown. At no time did the Respondent warn or notify Greathouse about his being in the parking lot. In this connection, it is noted that in the case of Peukert, *supra*, Hobbs gave her a written warning for being away from her job but did not discharge her.

(k) *William Greathouse.* Greathouse was employed on May 14 and terminated June 15. Foreman MacElwee interviewed him and, so Greathouse testified, explained the Respondent's absentee procedure as follows: "He told me that the first week that we were there that we could not be absent, that it was the policy if you were absent any day within the first week you would be automatically terminated. He told me if you were absent you had to call in in 3 days or you would be terminated. If you call in within a 3-day period, that it would be all right." Richard Covey, who had been a foreman on the second shift and hired and discharged employees, explained the absentee policy as follows: "Well, to my knowledge, unreported absenteeism .... We usually waited around 3 days and if they did not call in we automatically terminated them. On the reported absenteeism, I can't remember having any certain set policy about that." Later on Covey testified that Brown "had told me that, I am pretty sure that it was three, to issue to each person a warning about absenteeism and unreported absence or something like that and .... I believe it was three, three, well, they were automatically terminated."

Greathouse was hired specifically to operate the trouser guard machine, and was trained for that work for 3 days by another employee.[4] He was then transferred to the second shift, under Foreman Covey. He obtained signatures on 22 union membership cards on June 11, in the lunchroom during his break, and some before and after work. On June 11 he was standing outside the Respondent's premises in the parking lot with Marilyn Kimberlin passing out union cards for about 30 minutes. On Sunday night, June 14, Brown transferred him to the third shift after Greathouse asked Brown if this could be done because the opening was available due to the discharge of his brother, Ronald. During the 2 days that Greathouse had been on the third shift, the trouser guard machine had been operated for 6 hours. He had reported to Foreman Hobbs that the machine was inoperative and Hobbs assigned him other work such as packing, working in the paper department and in the caping room, and boxing and packing boxes which he placed on skids.

On Monday, June 15, General Manager Ward called a meeting of the third shift at 7:30 a.m., just after they came off duty. He told them "that there had been some changes made within the plant," but that the employees were not to "pay any attention to the rumors" they had heard and that the people on the third shift "need not worry about anything because they had already made the changes they were going to make on that shift."

On June 15, the night before he was discharged, Foreman Hobbs told Greathouse that he was doing a good job. At that time Greathouse was driving a forklift and loading a truck. When Greathouse was working on the second shift under Foreman Covey, the latter also told him that he was doing a good job.

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[4] According to former Foreman Covey, Foreman Hobbs asked him how much training was usually given an employee on the trouser guard machine, and Covey said approximately a month.

About 6:30 on the morning of June 16, Foreman Hobbs told Greathouse that he had been terminated, and explained that the termination did not have anything to do with his work but that he had received orders to discharge Greathouse.

On June 13, Ward told Covey that Greathouse was going to be moved to the third shift because there was no one on that shift who was familiar with the trouser guard machine. On June 16, at about 3 a.m., so Covey testified, Foreman Hobbs told him that he (Hobbs) had orders to terminate Greathouse that morning and asked Covey what he thought about it. Covey was somewhat noncommittal and Hobbs asked him how he (Covey) thought the trouser guard machine was operating. Covey answered that it was not operating properly and had not been for approximately a year. Hobbs commented that he did not understand how anyone could train on a machine that was not working properly and asked Covey how much training usually was given an individual on that machine. Covey answered that it required approximately a month. Later that morning Hobbs again expressed concern about having to discharge Greathouse, saying to Covey that he did not "think much of terminating him" but stated Brown had instructed him to do so. Greathouse was given a separation notice, signed by Hobbs and dated June 16, which stated: "Not suited for this type work. No other work available."

(1) *John Ashby.* Ashby was hired by the Respondent on May 15, and was assigned to work on the second shift as an adjuster on the strut machine. Ashby is a relative of Covey. In addition to working as an adjuster on the strut machine Ashby made boxes and relieved other employees as needed. He worked 6 days a week. On June 11 he signed a union card.

About midday on Monday, June 15, Brown told Ashby that he would be released due to the cutback and stated that it was not a layoff but a termination.

Covey, who had been Ashby's foreman until he voluntarily relinquished that job, was told by Brown on June 13 that the plan of having an adjuster in the strut department had not worked out and that the Respondent was going to hire a general technician for that job which would have a lower wage scale than that of an adjuster. Brown also indicated to Covey that the day shift adjuster would be discharged.

Brown testified that at the request of Foremen Covey, MacElwee and Hobbs, it had been decided to hire adjuster trainees on the strut machine but he added that the job would be eliminated if production performance did not improve. When Ashby and James Walter Forbis, another adjuster, were discharged, the Respondent hired two new employees to perform that work and gave them a lower classification of "general" employees. So far as it appears, there was no alteration in the job duties.

(m) *James Walter Forbis.* Forbis was hired, according to the Respondent, on May 15. He was terminated on June 13. He, along with Ashby, was assigned as a trainee on the job of strut adjuster and placed on the first shift under Foreman MacElwee. He signed a union card on June 11.

According to Forbis, he was told that his shift might be changed but was not informed that his job was temporary. He worked on Saturday, June 13. On Sunday when he and DeMent were together enjoying some recreation by riding horses, Foreman MacElwee came to see them about the middle of the afternoon. According to Forbis, MacElwee stated that "there had been a shakedown or something like that" and that they should see their foreman before clocking in on Monday morning. Forbis testified that DeMent "started haggling a little bit" and "in a roundabout way" indicated that the layoff was due to the union activity.

In addition to his job as adjuster, Forbis had been assigned to clean and repair water machines and in connec-

tion with his adjusting job was told by Brown that he would need to purchase various tools. Forbis did so, spending some $30 for tools.

(n) *David Covey.* David Covey, the father of Richard Covey, was hired about May 18. Covey did not appear as a witness at the hearing, but the record shows that on Saturday evening, June 13, his son Richard and Brown had a conversation with respect to David Covey. David Covey was a wire-hanger adjuster on the third shift, and had hurt his back on the job a few days before June 13. Brown informed Richard Covey that his father was being terminated because of the back problem and in consideration of his age, stating that it was felt that David Covey's injuries might prove to be something of a more serious nature. Richard Covey told Brown that his father had had some trouble with his back for several years but it never seemed to bother him and was not regarded as serious. In addition, Richard Covey mentioned that there were two or three other openings available, but Brown said that he did not think that David Covey would be able to handle these jobs. Brown asked Richard to notify his father of the termination. Contrary to the Respondent's absentee report, David Covey did not resign for health reasons.

2. Terminations at Liberty

(a) *Joseph DeMent.* DeMent was hired on April 3 as a maintenance welder under Troy Keys. During his employment he worked on all of the machines except those in the coathanger department and in addition did some maintenance work. When he was hired he told Keys that he was looking for a job that would give him steady work and Keys replied, "We have enough work right here, if they never get another order, this factory can go six months."

On Sunday, June 14, Foreman MacElwee came to the home of Forbis and told Forbis and DeMent, who was also

there, that they did not need to be to work on time Monday for the reason that they were terminated. DeMent inquired why the Respondent was laying him off and MacElwee responded that it was due to a work shortage. MacElwee further stated that: "All I know is they had a big meeting last night and Mr. Brown called me and told me to come out to your house and tell you you were laid off." DeMent commented that the layoff was due to union activity and MacElwee answered, "Well, it might be, but I can't talk to you about it . . . I would be placing my own self in jeopardy."

On Monday, June 15, DeMent spoke to Keys about the discharge. DeMent was told to check it about 7:30 that morning, but did not find Keys until approximately 9 o'clock. Keys was in the plant and, according to DeMent, was watching Sells working. DeMent walked up behind Keys and, when he addressed Keys the latter, so DeMent testified, "jumped like he was shot, you know." He asked Keys why he had been laid off after having been told that he had a steady job and that he need not worry about a layoff. Keys responded by saying they should go to the office. There, Jones gave DeMent his paycheck and Keys asked DeMent to sign a paper, but DeMent refused. According to the Respondent's records, DeMent was laid off because of a reduction in force.

After his discharge, DeMent went to pick up his tools and while doing so encountered his foreman, Bill Betz. Betz asked DeMent to do some welding and DeMent responded, "I don't work here any more." Betz asked what he meant and DeMent stated he had been discharged. Thereupon, Betz threw up his hands and said, "That God damn union, they have tried it here before." Betz then asked DeMent not to say anything about his comment, stating that he was old fellow and about ready to retire.

Betz' job was to supervise the building of new machines both for sale and use by Midwest. However, he was handi-

capped in this on many occasions by reason of the fact that Keys would take his men and use them on maintenance work at Midwest. As a result, Betz and Keys frequently had arguments over this matter. Neither Betz nor Keys had mentioned the possibility of a layoff to DeMent and the latter testified that there was so much work waiting to be done that he thought he was "behind 12 horses going the other way."

About a week or two after his termination, DeMent met Foreman MacElwee at a bar in town. MacElwee would not talk to DeMent about his termination saying, "Joe, I can't talk to you about this." After MacElwee quit he did tell DeMent that the latter and others were laid off for union activity and that the Company was "trying to get the key ones out because the Company didn't want a union in there."

When General Manager Ward was first called as a witness by the General Counsel, he testified that if there was a slack in the business of Midwest there would not necessarily be a slack at Liberty and, in fact, a slowdown at Midwest might result in an increase in work for Liberty employees. He stated that Liberty was losing money because it did not have the properly skilled employees and that Liberty lost money in 1970 and that condition worsened as time went on until the end of the fiscal year in May.

Keys testified that he had spoken to DeMent several times about his work, which he characterized as "poor," and that he had told DeMent if his work did not improve he would be replaced. Keys further testified that earlier in the week he had told Brown that DeMent would have to be replaced unless his work improved. Brown gave Keys a list of employees to terminate on Monday morning, June 15. DeMent was the only employee the two had discussed discharging. Nothing was placed in DeMent's personnel file regarding the quality of his work although Keys admittedly

had been instructed to write up such matters and place them in employees' personnel file.

Foreman Betz had not been made aware of the fact that Liberty employees were going to be terminated.

President Jones testified as follows regarding the termination of Liberty employees:

> We were out of funds. Most of those people we laid off. I did dictate this, I did say to lay those people off. My reason was they were maintenance type people, they were not machinists. Of necessity we had to extend our maintenance program. We had plenty of work. I have heard several of them get up here and say we had plenty of work, there is no questions about it, but we were out of funds and couldn't do it. We had machines all over the plant that needed repair. I suppose if you had all the money you wanted, you'd hire a lot of repairmen and you'd go out there and fix them all, but we had to extend that maintenance time based on how much money we had. Liberty Engineering was out of funds, it had no money.
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> * * * *
>
> There was plenty of mechanical work around there and there still is. There is no question about the amount of mechanical maintenance work. If I had twelve people working out there, they wouldn't be able to finish in six months, but it is not a question of a lot of work, it is a question of do you have the money to pay them.

In addition, Jones testified that Liberty had shipped one machine prior to June 1970 and only one after June and, as of the date of the hearing, another machine was about ready to be shipped. Jones further testified that the monthly profit and loss statements of Liberty showed that from December 1969 through December 1970 there had been

a loss in each month and that the total loss for that period was $16,000.

(b) *Michael Owens.* Owens was hired on March 30, 1970, by Keys as a general maintenance employee. He repaired machines, hung fire extinguishers and hoses, worked on hanger machines in the plant, and did general maintenance work. Betz was his immediate foreman.

Owens signed a union card on June 11 and obtained membership cards from three other employees—Gerald Williams, Charles Lankford, and Charles Dittemore.

On Monday, June 15, at about 3:40 p.m. Keys told Owens: "Mike, I hate to tell you this; we are having a cutback . . . there is no work coming in and we are going to have to lay you off." Owens inquired when he would be called back and Keys replied that he did not know. Owens then asked, "Troy, is this a layoff or . . . or is this over a union deal?" Keys responded that he did not know anything about a union deal.

No member of management had ever expressed dissatisfaction with Owens' work; indeed, the week prior to his termination Supervisor Keys told Owens that it would be nice if they had a few more men like Owens at the plant. In a conversation with Brown following his discharge Owens was told that the termination was not due to union activity but was occasioned by the fact that the maintenance department had run out of funds.

(c) *Charles Lankford.* Lankford was hired on May 18, as a maintenance machinists. He was not called as a witness. Keys testified that Lankford could not perform, that he was very slow and required a lot of supervision. He signed a union card on June 11. On Monday, June 15, Keys told him that he was being laid off due to a reduction in force.

(d) *John Sells.* Sells was hired on February 27, and was assigned the job of machine adjuster and machinery

maintenance. Before being hired he was told by General Manager Ward that the Respondent intended to automate some of their machines in order to speed up out-put, and Sells expressed interest in doing that type of work.

Sells was called in on occasion at night when the Respondent needed assistance in getting machines running. At the time of his discharge, one machine had just been taken out of the plant and brought into the shop for overhaul.

On Monday, June 15, Sells came to work at the usual time and discovered that his timecard was missing from the rack. He told Foreman Betz that he did not have a timecard and Betz said he would find it. In the interim, Sells noticed that Supervisor Keys was "peeking around" watching him.[5] At about 10:30 in the morning General Manager Ward came to Sells and stated, "I hear there is some union talk going on around the plant . . . did you hear anything like that?" Sells replied that he had heard it and, in answer to Ward's further inquiry, stated that he had heard such talk "at least a couple of weeks." Ward responded that, "Well, if you hear anything else, let me know."

After finishing some work Sells went to the machine shop to pick up a work order for the repair of some machines and again noticed that he was being closely watched. In the afternoon he picked up a work order and pursuant thereto went into the plant to work on a machine. He noticed, but did not overhear, an argument between Keys and MacElwee. A few moments later Keys came to Sells and, so the latter testified "more or less pounced on me" about working machines without a work order. Sells "just let him rave" and shortly thereafter pulled out the work order from his pocket and showed it to Keys who thereupon

[5] As previously related DeMent also noticed that Keys was watching Sells.

left. About 3 p.m. Keys told Sells he was being terminated and handed him his check.

C. *The Refusal to Reinstate Grover Speck*

Grover Speck was employed by the Respondent on February 27, 1967, as an over-the-road truckdriver. The day the strike began Speck went to the plant about 5 o'clock to pick up a truckload of hangers, as he intended to leave for his destination about midnight. When he arrived at the plant he found that the employees were picketing. Speck stopped and talked to some of the pickets to find out what was occurring. He was told that the employees were on strike and he stated that he had come to take a load out. One of the strikers, Vincent Brian, asked Speck if he was going to cross the picket line; Speck answered that he was not and would go along with whatever the rest of the employees did. The following day President Jones called Speck but the latter was not at home. Finally, Speck's wife did get in touch with him at about 6 o'clock. Speck did not know Jones' home telephone number so he attempted to call General Manager Ward, but Ward was not at home. Eventually Speck went to the plant and talked with Ashenfeld, the controller.

Speck testified that during the strike he was out of town about three-fourths of the time working at various places. He was present at the meeting when the strikers met and voted to return to work. By arrangement with Greathouse, Speck hauled a small camper trailer behind his pickup, which the strikers had used while on strike. Two or three cars of strikers accompanied Speck. After returning the camper trailer one of the strikers did not have transportation back to the plant, so Speck took him back. While on the way, Speck stopped at a friend's house to pick up some material the friend had obtained for him. A few days later, in talking to a driver on the telephone, Speck learned that he was supposed to have been following one of the

replacement drivers. Speck vigorously denied that he had followed any company trucks or threatened any employees or drivers of the Respondent.

On the morning of November 4, Speck telephoned Ward concerning the Respondent's return to work letter. While speaking to Ward, Jones came on the line and told Speck that he had been named for harassing, threatening and following drivers of the Respondent and that Jones did not care whether Speck came back to work or not. Speck endeavored to explain the situation but Jones stated he was not interested. After Jones got off the phone, General Manager Ward talked to Speck and told him to call the following Monday, that the Company was having problems getting matters lined up and loads made for the drivers. Speck did call Ward on Monday but was told that Ward could not tell him anything. He called back the following day and Ward then stated that the entire matter was up to Jones, but that Jones was then out of town. Speck tried again on Wednesday but was unable to reach Jones.

During the strike Speck applied for work at an establishment called Desert Gold and spoke to one Paul Smith. Smith asked Speck whether he was no longer working for Respondent and Speck replied that he had been accused of doing things. Smith asked Speck how he felt toward Jones and Speck replied that he had always respected Jones and enjoyed working for him, but added that there were a number of things of which Jones was not aware. He related that on one occasion while in Oklahoma he had been injured and worked 3 hours unloading one trailer and loading another and had hired some men to assist him. When he turned in his time Ward, after several conversations concerning the matter, told him that he should collect from the Shock Truck Leasing Company (which leased the trucks to the Respondent) as his claim was an insurance claim and it was up to the lessor of the trucks to satisfy it.

During his employment Speck had two major accidents and three minor ones. The last accident occurred some 6 to 9 months prior to March 1970. Speck related that he had considerable trouble with one truck that was assigned him and told the manager of the lessor that there must be something wrong with it because on practically every trip he made he had mechanical failure of some kind. It appears that William Wilhite, the lessor, spoke to Jones about Speck's alleged abuse of the truck, the last time being late in September of 1970. At this time Jones replied, as in times past, "that he wasn't so sure that all of this was his (Speck's) fault nor could we actually prove this beyond any shadow of doubt, and that he didn't have anybody else right then to put on the equipment." According to Wilhite, the equipment driven by Speck sustained maintenance costs equal to the other two units leased by the Respondent. He also stated that Speck's equipment required a major overhaul after being driven 100,000 miles, whereas the other two units did not require major overhaul until they had been driven 200,000 miles.

D. *Conclusions as to Terminations*

1. The layoffs

We note at the outset that the Respondent has a very difficult problem in obtaining and retaining competent employees. As counsel for the Respondent correctly points out in his brief, the Respondent had "a tremendous turnover problem amounting to over two hundred percent (200%) in 1970." By reason of the price increase of its product, which was announced in May and was to become effective in mid-June, the Respondent anticipated, with reason, that its sales of products would rise sharply but then would drop considerably after the effective date of the price increase. In consequence, it made plans to reduce the number of employees. During the weekend preceding Monday, June 15, Brown and Ward conferred and

determined which employees were to be released. Quite inconsistently, however, as is shown in a preceding section, the Respondent continued in April, May and June to hire new employees. It chose to retain many of these despite the fact that most of those that it released were employees with considerable experience as well as with seniority over the new hires.

President Jones testified that the Respondent, in making layoffs, attempted to go by seniority but then qualified that by stating that it selects the most inefficient and least trained employees for termination. As to whether the Respondent followed departmental or job description seniority he replied: "We have attempted to mainly go by the tenure with the Company, the longer they have been there, then they are the senior employees, senior people, regardless of department. There are other times when we have had to exercise seniority within the department because people are not trained to work in other departments, so it makes it almost impossible to use one system." Aside from the large turnover, which averages well over 20 per month, about 50 percent of the employees are women and, as Jones testified, their attendance is spotty and worse than that of male employees. It would appear to me that a more sensible course for the Respondent to have followed would have been to hire fewer replacements as the effective day of the price increase approached and thus avoid the alleged necessity for terminating experienced, senior employees. As ex-foreman Covey testified, he told Brown when he learned of the proposed terminations:

> First off, he said the entire caping room on the second shift, and I told him, I said, "Gene, that's—why are you cutting back on the second shift," I said, "The third shift has just started their caping room, the people are not trained, they don't get any kind of production out." I said, "I have three girls back there in that caping room and they run the caping room by

themselves and they get three times the production of the third shift." I said, "It doesn't make sense to cut back on the second shift when you have twice as many people on the third not getting any production.

Brown's response was that he realized the validity of Covey's observation. Covey told Brown that Sharon Meier was the best worker he had and that she had stayed over on a number of nights to fill orders and that the entire caping room staff would stay over an extra hour to fill special orders for truckloads. In addition, it should be noted that General Manager Ward had previously told Richard Covey that he (Ward) thought that the Union turmoil was being created on the second shift. At the same time the Respondent retained the trainees on the third shift, at a differential of 5 to 10 cents more per hour, and this at a time when the Respondent allegedly was experiencing financial difficulties.

Although the Respondent contends that the principal reason for the terminations was because of the economic need to reduce its force, it does not explain or clarify its reasoning in discharging so many employees for "absenteeism" rather than assigning the termination to a reduction in force. If the true reason for termination was the union activity of the employees, most of whom had not received prior warnings or reprimands with respect thereto, then it would seem plain that it could not justify laying them off because of a reduction in force while at the same time hiring new employees. This consideration suggests that "absenteeism" was but a pretext. In the case of Margaret Buckley, who was on leave of absence, the reason "absenteeism" could not be used and the reason assigned in her case was "reduction in force, no other jobs available." In fact, however, there were many jobs available.

President Jones testified that the layoffs were occasioned by dropping business and that he did not anticipate business picking up "for quite some time." Somewhat inconsistently, however, he also testified that he thought that business "would pick up again in a matter of maybe a couple of weeks, three weeks, four weeks."[6]

There is credible evidence that the layoff with which we are here concerned was not consistent with the Respondent's past practices. Ex-Foreman Covey testified, without contradiction, that during the years he had been a supervisor when there was a seasonal lull (which did not always occur), the third shift employees would be laid off or transferred to other shifts. Understandably, some of these employees would eliminate themselves because they would be unable, for personal reasons, to work on other shifts.

The Respondent would have us believe that the terminations for "excessive absenteeism" were a customary and common-place occurrence both before and after the advent of union activity and the discharges with which we are here concerned. Counsel for the General Counsel argues that this contention "is simply not true as can be readily seen by a comparison of other employees' personnel files who were terminated" for this reason with the employment history and personnel files of the individuals discharged around June 15, for this reason. As related above, it is the Respondent's position that President Jones, by telephone, told Ward on June 12, to get rid of the necessary employees during the weekend of June 13-14. Customarily,

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[6] Sales in 1970 were as follows:

January	$202,000	July	$127,000
February	203,000	August	145,000
March	227,000	September	218,000
April	236,000	October	139,000
May	210,000	November	192,000
June	315,000	December	201,000

the Respondent's management makes up the crew coverage list for a week during the latter part of the preceding week or over the weekend. The crew coverage sheet for the week of June 14, so Brown testified, must have been an accurate draft by late Sunday night, June 14, for the secretaries were to type it up Monday morning. This crew coverage sheet contains the names of Bristow, Elliott, Kimberlin, Lauderdale, William Greathouse, Owens, and Lankford, all of whom were discharged about June 15. Thus, counsel for the General Counsel argues that "these employees could not have been discharged as a result of Jones' phone call on June 12, to get rid of the excess employees over the weekend. . . ." Counsel for the General Counsel continues as follows:

> It is important to remember that Jones told Ward and Brown to discharge employees in April (T. 536) and both Brown and Ward admit that they were aware that they had an excess number of employees on the payroll for a year or so, and had been told by Jones to reduce the employee complement as much as a year prior to June 15, continuously. Jones' testimony about the June 12 phone call to Ward to get rid of the employees, which testimony was later adopted by Ward and Brown in their subsequent testimony, but which they apparently didn't "remember" when called earlier in the hearing by the General Counsel, is nothing more than a frantic effort to supply an answer to a question which both Ward and Brown were, at first, unable to answer. At first, Ward said the discharges were just a run-of-the-mill, every day, customary occurrence. Then he was "reminded" of the phone call by Jones' testimony. Obviously Jones' testimony is a fabrication.

While I hesitate to label the testimony of President Jones in this regard as a "fabrication," I must observe that, in view of the earlier testimony of Ward and Brown, it

is suspect and in any case self-serving. Analysis of the Respondent's crew coverage sheets beginning with the week of June 7, reveals the following:

Week beginning June 7	—83	
Week beginning June 14	—90	
Week beginning June 21	—80	(despite the discharges)
Week beginning June 28	—79	
Week beginning July 5	—78	
Week beginning July 12	—70	
Week beginning July 26	—74	

Thus, during the critical week the number of employees was reduced by only three, a negligible number considering the high rate of turnover. It was not until the week beginning June 28 that the number of employees dropped to 79, but we must not overlook the fact that earlier most of the discharges here involved had occurred.

Counsel for the General Counsel points out that, with respect to the service letters given certain employees, stating that they had been discharged for excessive absenteeism and had been previously warned, this "simply is untrue." Except for one employee, General Counsel is correct. Subsequent to June 15 or 16 several employees were terminated for the stated reason of excessive absenteeism. Counsel correctly points out that these discharges were based, in part, upon the warnings given these employees on or about June 15 and 16, a practice that varies with the Respondent's standard operating procedure. He therefore argues that the Respondent "was attempting to institute a warning policy that it had not implemented in the past, in order to attempt to justify the discharges of the employees" here involved and also "in order to set up other employees for discharge."

Regarding the discharges of Forbis and Ashby, the two adjusters, it seems plain that the Respondent had not had a sufficient opportunity to evaluate their performance. The adjusters were hired as a result of a request by foremen,

but they were terminated without any consultation with the foremen as to their opinion of how that operation was working out. Moreover, they had not completed an adequate training period and therefore, quite obviously, would be encountering some difficulties with the job.

The discharges of William Greathouse and his brother Ronald were not for "absenteeism" since they had not been employed long enough to have an absentee record sufficient to warrant terminating them. William Greathouse was scheduled to work during the week of June 14, and the morning of Monday, at about 7:30 a.m., before the Respondent had received the letter requesting recognition from the Union, Ward told all the employees on the third shift, including Greathouse, that there was nothing more to worry about and that there would not be any more discharges of third shift employees. Ronald Greathouse was not terminated pursuant to a request by Foreman Hobbs, as the latter originally testified. Moreover, the record also shows that Hobbs was not disposed to discharging employees merely for being absent from his work station for a brief period.

The record also shows that a substantial number of employees were not discharged although their absenteeism was, as of the week beginning June 14, in excess of the absenteeism of the discharged employees. In addition, it should be noted that these employees, listed in Appendix C, were more recent hires than most of the employees with which we are concerned. Two of these employees, Hoevet and Cook, had 44 and 40 hours of absenteeism, respectively, and were third shift caping room employees. They had been hired in March and May, respectively, and were paid 5 or 10 cents more per hour because they were on the third shift. Nonetheless, the Respondent did not see fit to discharge them and put experienced second shift caping room employees in their place, or at least make such an offer.

The selection of those discharged on June 15 was not based on recommendations by the foremen, the normal method, but instead the employees were selected for discharge by Ward and Brown; in some cases the employees' foremen opposed the selection.

At the same time that the discharges were being made, the Respondent continued to advertise for machine adjusters, machinery maintenance men and machinists, and in one advertisement stated that it had openings on the second and third shift. In explanation of this, Jones gave the lame excuse that the ads were merely for "advertising purposes."

Although the record does not reveal that the Respondent ascertained that each of the discharged employees had been engaged in union activity, it is nevertheless a fact that approximately 99 percent of those terminated were members of the Union, whereas the Union had signed up only about 75 percent of the employees. As the Second Circuit Court of Appeals observed in *N.L.R.B.* v. *Piezo Manufacturing Corporation*, 290 F. 2d 455 (C.A. 2), "a finding that Ligh, respondent's vice president, knew whether or not the employees whom he laid off had signed union authorization cards was not essential to the Board's decision. The layoffs occurred almost immediately after Ligh had been informed that a majority of respondent's production and maintenance employees had selected the union to represent them. The Board could infer both from the timing of the layoffs, and from Ligh's statements made almost contemporaneous with them, that they were intended to discourage respondent's employees from adhering to the union at a period critical to its future at respondent's plant and also to affect the union's majority, which they in fact did. Under these circumstances the Board was warranted in rejecting respondent's contention that the layoffs were economically motivated." The timing and circumstances of the discharges, coupled with the Respondent's inadequate

explanation thereof, warrant, in my opinion the inference that the discharges were effected because of the union activity of the employees. See, e.g., *McKinnon Services Inc.*, 174 NLRB No. 169.

The terminations at Liberty are sought to be justified on the basis that Liberty was losing money and that the men who were terminated were not machinists and, although there was an abundance of work for maintenance employees, there were no machines being turned out by machinists for outside consumption. Somewhat by contrast, the Liberty employees at the time they were discharged were told that the reason was that work was not coming in. Although there is creditable testimony (Sells) that the Respondent did build machines for Midwest rather than solely for outside consumption, Jones testified that the reason for not building many machines for outside consumption was that the Respondent did not except orders for new machines. It is also worth noting that the terminated Liberty employees were not machinists and were not hired as such but, rather, each terminated employee was a maintenance employee. Although Jones testified that Liberty was losing money, that had been the fact for the last 5 years and Jones was aware of this. Nevertheless, Liberty hired all the discharged maintenance employees, except for Sells, in the spring of 1970. Finally, it seems somewhat odd that the Respondent should wait until the latter part of September 1970 to borrow money to relieve Liberty's financial situation if, in fact, the Respondent was in severe financial trouble more than 2 months earlier.

To conclude, after a careful consideration of the entire record I am convinced that a substantial and motivating factor in the termination of all the employees named in the complaint is attributable to union animus on the part of the Respondent and the union activity of the involved employees. I so find. With respect to Grover Speck, the Respondent's defended on the ground that he had harassed,

threatened, and followed drivers and other employees. The record, in my opinion, does not support this defense to the Respondent's refusal to reinstate him following the strike. President Jones stated that on several occasions strikers followed trucks, and he described one such incident, involving two supervisors, Jerry Yockel and Dave Steele. According to Jones, Speck and other strikers followed the two supervisors and Jones called the chief of police and suggested that he follow the truck down the highway and stop the persons trailing the truck. The chief of police did so and spoke to the occupants of the car. With regard to Speck's alleged abusive treatment of equipment the only testimony indicating that he did mistreat equipment came from Wilhite, the lessor of the trucks. Significantly, however, Wilhite did not produce any records to substantiate his statement, although it would appear reasonable to believe that such records were readily available. In sum, I am convinced and find that the Respondent refused to reinstate Speck because of Speck's union membership and activity. By the foregoing layoff and discharge, the Respondent violated Section 8(a)(3) and (1) of the Act. Moreover, by the acts of interference, restraint and coercion found in Section 3(b) above, the Respondent independently violated Section 8(a)(1) of the Act.

E. The Refusal to Bargain

1. The unit and majority

The Respondent admits, as alleged in the complaint, and I find, that all production and maintenance employees, including truckdrivers, at the Respondent's Liberty, Missouri, plant, but excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. I further find that on and after June 15, 1970, when the Union's demand for recognition was received by

the Respondent, the Union represented a clear majority of the Respondent's employees, as evidenced by valid membership cards signed by the Respondent's employees, and that, therefore, the Union was the exclusive bargaining representative of the employees in said appropriate unit at all times on and after June 15, 1970.

The Respondent argues in its brief that the Union, by "filing the representation petition on the day of its demand for recognition, submitted the representation question to the processes of the Board and abandoned its reliance on establishing majority by card check." I find no merit in this contention. The Union's letter of June 12 clearly stated that it was willing to submit the authorization cards to a "mutually acceptable agency or person in order that our majority status in the bargaining unit described above may be verified." It also stated that it had filed a petition with the Board in order "to protect our legal rights in the event you refuse to recognize us on the basis of the proposed card check," and that if the Respondent consented to a card check the Union would promptly withdraw its representation petition. Moreover, I am persuaded that the Respondent's flagrant and widespread unfair labor practices as detailed above, were of such in nature as to make impossible the holding of an election in an atmosphere free from fear or coercion. Consequently, a bargaining order is warranted in these circumstances as established by Board and Court precedent. *Gissel Packing Co.*, 395 U.S. 575. Accordingly, I find that the Respondent has unlawfully refused to bargain with the Union as the exclusive representative of the employees in the appropriate bargaining unit and that thereby the Respondent violated Section 8(a)(5) and (1) of the Act.

Conclusions of Law

1. The Respondent, Midwest Hanger Co. and Liberty Engineering Corp., is an employer within the meaning of Section 2(6) and (7) of the Act.

2. The Union, United Steelworkers of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. By terminating the employment of the 18 employees set forth in the complaint as amended and by refusing to reinstate Grover Speck, the Respondent unlawfully discriminated against them and thereby violated Section 8(a)(3) and (1) of the Act.

4. By questioning employees concerning their feelings about the Union, by questioning them about their union activity and the union activity of other employees, and by threatening employees with discharge or other reprisals for engaging in a strike, the Respondent violated Section 8(a)(1) of the Act.

5. All production and maintenance employees, including truckdrivers, at the Respondent's Liberty, Missouri, plant, but excluding office clerical employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. At all times since June 15, 1970, the Union has been the exclusive bargaining representative of the employees in the aforesaid unit within the meaning of Section 9(a) of the Act.

7. By refusing on and after June 15, 1970, to recognize and bargain collectively with the Union as the exclusive representative of the employees in the aforesaid appropriate unit, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

8. The aforesaid unfair labor practices are unfair labor practices burdening and affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Respondent has engaged in unfair labor practices violative of Section 8(a)(5), (3) and (1) of the Act, it will be recommended that it cease and desist therefrom and take the necessary affirmative action to effectuate the policies of the Act. Since I have found that the Respondent unlawfully terminated the employment of the employees named in the complaint as amended, and unlawfully refused to reinstate Grover Speck, and such of the laid off employees as have not heretofore been fully reinstated, I shall recommend that the Respondent offer the latter and Speck immediate and full reinstatement with backpay computed on a quarterly basis dating, in the case of the employees laid off from the date of their layoff and in the case of Grover Speck from November 4, 1970, plus interest at 6 percent per annum, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716, and to post appropriate notices.

Upon the foregoing findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[68a]

Order

Respondent, Midwest Hanger Co. and Liberty Engineering Corp., Liberty, Missouri, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging union membership or concerted activities of its employees by discriminatorily discharging or

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[68a] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

refusing to reinstate any employee, or by discriminating in any other manner in regard to their hire or tenure of employment, or any term or condition of employment.

(b) Refusing to recognize and bargain collectively with United Steelworkers of America, AFL-CIO, as the exclusive representative the employees in the appropriate unit.

(c) Questioning employees concerning their union membership or activities or threatening to discharge employees because of their membership or activities in the Union, or in any other manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form labor organizations, to join or assist the above-mentioned Union or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer to such of the employees named in the complaint, as amended, who have not heretofore been fully reinstated, and to Grover Speck, their former jobs, or if these jobs no longer exist, to substantially equivalent positions, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them, in the manner set forth above in the section entitled "The Remedy."

(b) Notify immediately the above-named employees, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

(c) Upon request, bargain collectively with United Steelworkers of America, AFL-CIO, as the exclusive representative of the employees in the unit described above concerning wages, hours, and all other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(d) Post at its Liberty, Missouri, plant, copies of the notice attached hereto as "Appendix C."[7] Copies of said notice, on forms provided by the Regional Director for Region 17, shall, after being duly signed by an authorized representative of Respondent, be posted immediately on receipt thereof, and be maintained for a period of 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 17, in writing, within 20 days from the date of the receipt of this Decision, what steps Respondent has taken to comply herewith.

Dated at Washington, D. C.

/s/ IVAR H. PETERSON
Ivar H. Peterson
Trial Examiner

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[7] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[8] In the event that this recommended Order is adopted by the Board after exceptions have been filed, this provision shall be modified to read: "Notify the Regeional Director for Region 17, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith."

Name of Employees	Date Hired	Hours Absent	
Wanda Travis	4- 6-70	25.00	
Corrine Wilson	4- 8-70	8.80	
Elsie McDonald	4- 6-70	3.75	
Ada Worth	4- 3-70	8.50	
David Schwarz	4-10-70	16.25	
Gerald Williams	4-15-70	0	
Daniel Eckersley	5- 6-70	32.00	(including 24 hours leave of absence)
Evelyn Butler	5-15-70	10.20	
Marianna Clevenger	6- 3-70	0	
Jeff Van Riper	6- 3-70	0	
Kim Bristow	4- ?-70	42.75	(alleged 8(a)(3), later terminated)
Betty Cook	5- ?-70	40.00	
May Cline	5- ?-70	20.25	
Thomas Eckersley	5- ?-70	44.56	(including 24 hours leave of absence)

Name of Employee *	Date Hired	Date Terminated	Reason Given	Days Absent	Date Signed Union Card
Margaret Buckley (M)	4/11/69	6/14/70	GC (brief)—reduction in work force Resp.—her shift was eliminated	0	Record doesn't indicate card was signed
Sharon Meier (M)	11/5/69	GC 6/14/70 Resp. 6/13/70	repeated absenteeism (GC—no prior warning)	27 hrs.	6/11/70
David Covey (M)	GC 5/70 Resp. 5/18/70	6/13/70	resigned—health reasons	19 hrs.	6/11/70
John Ashby (M)	GC 5/15/70 Resp. 5/18/70	GC 6/15/70 Resp. 6/13/70	GC—reduction in force Resp.—temporary employee	0	6/11/70
Walter (J) Forbis (M)	GC 5/70 Resp. 5/15/70	GC 6/15/70 Resp. 6/13/70	GC—reduction in force Resp. temporary employee	28.8 hrs.	6/11/70
Ronald Greathouse (M)	5 weeks prior	6/12/70	not suitable for job	24.0	6/11/70
Marilyn Kimberlin (M)	1/2/69	6/15/70	excessive absenteeism (never warned)	GC—53 hrs. Resp.— 11 days (1970) 17 days (1969)	6/1/70
Virgie Peterson (M)	3/20/70	6/13/70	excessive absenteeism (never warned)	103 hrs.	6/11/70
June Elliott (M)	5/6/68 11/3/69	5/69 6/16/70	excessive absenteeism (never warned)	53 hrs. (all Stats.)	6/1/70

* M refers to Midwest; L to Liberty

Name of Employee *	Date Hired	Date Terminated	Reason Given	Days Absent	Date Signed Union Card
Kim Bristow (M)	4/70	GC 7/1/70 Resp. 6/30/70	excessive absenteeism (received prior warning)	51 hrs.	6/12/70
Elaine Peukert (M)	11/7/69	7/1/70	excessive absenteeism (never warned)	55.5 hrs.	6/17/70
Betty Johnson (M)	GC 7/68 Resp. 1969	8/11/70	excessive absenteeism (first warning 6/16/70)	80.9 hrs.	6/1/70
Joseph DeMent (L)	4/3/70	GC 6/14/70 Resp. 6/13/70	GC (exh.)—reduction in work force Resp. (brief)—work unsatisfactory	0	6/11/70
Charles (J) Lankford (L)	5/18/70	GC 6/15/70 Resp. 6/13/70	GC (exh.)—reduction in work force Resp. lacked necessary skills	0	6/11/70
Mike Owens (L)	3/30/70	6/15/70	reduction in work force	0	6/11/70
John Sells (L)	2/27/70	6/15/70	reduction in work force	12.5 hrs.	6/1/70
William Greathouse (M)	GC 5/14/70 Resp. 5/18/70	GC 6/15/70	work unsatisfactory	0	6/11/70
Shirley Lauderdale (M)	6/9/70	6/15/70	Allergy, no work available that would not aggravate condition	0 0	Resp. brief indicates card signed prior to termination

* M refers to Midwest; L to Liberty

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board having found, after a trial, that we violated Federal Law by questioning employees regarding their union activity, threatening to discharge employees to avoid dealing with a union, by later discharging employees because of their union activity and refusing to reinstatement them, and refusing to bargain with the Union:

WE WILL OFFER full reinstatement to the employees listed below, if not heretofore fully reinstated, and pay them for the earnings they lost as a result of the discrimination against them, plus 6 percent interest.

Margaret Buckley	Kim Bristow
Sharon Meier	Elaine Peukert
David Covey	Betty Johnson
John Ashby	Joseph DeMent
Walter Forbis	Charles Lankford
Ronald Greathouse	Mike Owens
Marilyn Kimberlin	John Sells
Virgie Peterson	William Greathouse
June Elliott	Shirley Lauderdale

Grover Speck

WE WILL NOT discharge or discriminate against any employee for supporting UNITED STEELWORKERS OF AMERICA, AFL-CIO, or any other union.

WE WILL NOT question any employee regarding his union activity, threaten to discharge or refuse to reinstate employees in order to avoid dealing with the Union.

WE WILL NOT unlawfully interfere with our employees' union activities.

WE WILL bargain collectively with the Union as the exclusive collective bargaining representative for the employees in the appropriate unit and if an understanding is reached we will sign a contract with the Union.

The bargaining unit is:

All production and maintenance employees, including truckdrivers, at our Liberty, Missouri, plant, but excluding office clerical employees, guards, and supervisors as defined in the Act.

All our employees are free to become or remain, or refrain from becoming or remaining, members of any labor organization, except to the extent that such right may be affected by an agreement conforming to the provisions of Section 8(a)(3) of the Act.

MIDWEST HANGER CO. AND
LIBERTY ENGINEERING CORP.

Dated ..... By .....
(Representative) (title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, 610 Federal Building, 601 E 12th Street, Kansas City, Missouri 65106 (Tel. No. (816) 374-5181).

APPENDIX G

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7:

* * * * * * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that mem-

bership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1528

MIDWEST HANGER COMPANY AND
LIBERTY ENGINEERING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 474 F. 2d 1155. The Board's decision and order (Pet. App. 22a-72a) are reported at 193 NLRB No. 85.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 1973 (Pet. App. 16a-18a). The petition for a writ of certiorari was filed on May 11, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the employer discharged 17 employees because of their union activity.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 73a-74a.

STATEMENT

A. The Board's Decision

On June 12, 1970, after having obtained signed authorization cards from a majority of the Company's employees, the Union (United Steelworkers of America) sought voluntary recognition from the Company[1] and also filed a petition with the Board for a representation election (Pet. App. 27a, 42a, 49a, 63a; A. 400-401, 448-455, 551-552, 556, 576-578, 581-583, 120, 131, 83-95, 121-128, 134, 597-598).[2] On the weekend of June 13-14, Company officials met to effectuate a planned reduction in the workforce, due to an anticipated decline in sales following a price increase (Pet. App. 26a-28a, 53a; A. 608-611, 644, 282). General Manager Ward and Plant Manager Brown selected 22 employees, primarily from the second shift, who were to be terminated, and advised them, by telephone or in person, that their discharges

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[1] Midwest Hanger Company and Liberty Engineering Corporation. These two companies have common ownership and management, and occupy the same building. They constitute a single employer for purposes of the Act (Pet. App. 1a) and are referred to herein as the "Company".

[2] "A." refers to the appendix to the briefs in the court below. A copy has been lodged with the Clerk.

were effective immediately (Pet. App. 28a; A. 713). The Board found that 18 of these employees were selected for discharge because of their union activity (Pet. App. 60a-61a).

In making this finding, the Board relied upon the circumstances, *inter alia,* that: (a) the Company's explanation that it had selected employees for discharge because of their " 'absenteeism' was but a pretext" (Pet. App. 55a); (b) the Company continued to advertise for, and hire, new employees after it had fired experienced, senior workers (Pet. App. 54a-55a, 60a); (c) while the Company normally secured a supervisor's recommendation before discharging an employee, it had discharged some of these employees over the objections of a supervisor (Pet. App. 58a-60a); (d) the Company departed from its usual practice of laying off or transferring third shift employees rather than discharging second shift employees (Pet. App. 56a); (e) the Company had previously indicated that it considered the second shift to be the source of the union activity (Pet. App. 55a); (f) the discharges immediately followed the first in-plant union activity and the coercive interrogation of employee Sells (who was subsequently discharged) regarding such activity (n. 3, *infra*) (Pet. App. 60a-61a); (g) the Company discharged the employees after informing them orally and on the crew coverage sheets that they were scheduled to work (Pet. App. 57a, 59a); (h) the Company discharged a disproportionate number of employees who had signed union authorization cards (Pet. App. 60a). The Board ordered the Company to reinstate the 18 discriminatorily discharged employees, with backpay (Pet. App. 65a-66a).[3]

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[3] The Board also found that, in February and June 1970, the Company coercively interrogated John Sells concerning his attitudes

B. The Court's Decision

The court of appeals sustained the Board's findings with respect to 17 of the 18 employees.[4] The court noted that the Company had challenged the inference of anti-union motivation to be drawn from the circumstance that all but one of the 18 had signed union cards on the ground that other discharges of non-union adherents had occurred in the same period. The court concluded that, while this "may be correct, * * * there still exists substantial evidence in the record from which the Board could infer that the discharges were discriminatory" (Pet. App. 4a). The court relied primarily upon: (a) the Company's continued advertising for new employees after discharging experienced employees (Pet. App. 5a); (b) the departure from past Company practices during slack business periods (Pet. App. 5a); and (c) the Company's failure to consult with super-

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towards unions and working in a non-union plant that might have organizational problems, and his knowledge of union activity in the plant (Pet. App. 29a-30a; A. 499, 504-506, 516); and that, on October 30, 1970, the Company threatened strikers with discharge unless they abandoned a strike which had been called (Pet. App. 28a, 64a; A. 80, 591). Concluding that these unfair labor practices, in conjunction with the unlawful discharges, "make impossible the holding of an election in an atmosphere free from fear or coercion" (Pet. App. 63a), the Board ordered the Company to bargain with the Union (Pet. App. 67a). The court below enforced the Board's remedy for these additional violations of the Act (Pet. App. 8a-11a), and the Company does not challenge that action here.

[4] The court concluded that the Board's finding that Betty Johnson's termination resulted from union activity was unsupported by substantial evidence. The court noted the undisputed evidence of her repeated absenteeism despite warnings, and the long interval between the first group of discharges and Johnson's discharge (Pet. App. 8a).

visors before selecting employees for termination (Pet. App. 7a).

ARGUMENT

The issue sought to be raised in the petition—whether a reviewing court may sustain an agency on a rationale not considered by the agency—is not presented here. As shown (p. 3, *supra*), the Board based its finding that the discharges were discriminatory on a number of circumstances, one of which was that a high proportion of the dischargees had signed union cards. The Company challenged reliance on the latter circumstance on the ground that there had been other discharges of non-union employees. The court below found it unnecessary to pass on the validity of the Company's belated contention as to that particular circumstance,[5] since the other factors relied on by the Board were adequate to support its finding of discrimination.[6] Accordingly, the only issue actually presented is whether the court correctly concluded that, even apart from that factor, there is substantial evidence to support the Board's finding. Such an evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490-491. In any event, the facts summarized above show that there is ample basis for the Board's finding.

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[5] The Company first raised the contention at oral argument before the court and in a post-argument supplemental statement.

[6] The court did not inject a new element into the proceeding by noting (Pet. App. 5a) that the Company, while complaining about employee turnover and the resulting inexperience of its workforce, preferred to recruit new, untrained personnel instead of recalling the experienced dischargees (see Pet. App. 54a, 60a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1973.

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